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Supreme Court of the United States

OCTOBER TERM, 1907.

IN EQUITY. ORIGINAL, NO. 2

COMMONWEALTH OF VIRGINIA, Complainant

vs.

STATE OF WEST VIRGINIA, Defendant.

REPLY BRIEF FOR VIRGINIA UPON MOTION TO REFER THE CAUSE TO A MASTER.

WILLIAM A. ANDERSON,
Attorney-General,
and as such Counsel for Virginia.

Supreme Court of the United States

OCTOBER TERM. 1907.

IN EQUITY. ORIGINAL, NO. 4.

COMMONWEALTH OF VIRGINIA, Complainant

vs.

STATE OF WEST VIRGINIA, Defendant.

REPLY BRIEF FOR VIRGINIA UPON MOTION TO REFER THE CAUSE TO A MASTER.

The propositions contended for by the counsel for West Virginia in their elaborate brief upon the above motion will be here reviewed, though not in the order in which they are presented.

AS TO ORDER OF PROCEDURE.

While this court in *Rhode Island* v. *Massachusetts,* 14 Peters, 210, 257, considered it proper that the proceedings in that case should "be regulated by the rules and uses" of the English Court of Chancery, it declared that:

> "in a controversy where two sovereign States are contesting the boundary between them, it will be the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring this case to a final hearing *on its real merits. It is too important in its character, and the interests concerned are too great, to be decided upon the mere technical principles of chancery pleading.*" 14 Peters, 257.

It will not be gainsaid that this language applies with added force to this case.

The only rule of chancery practice adopted by this court, is in accordance with this just conception of its powers and duties, and is as follows:

> "Rule 3. This court considers the former practice of the courts of King's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary."

Neither the technical rules of practice obtaining in the circuit courts of the United States; nor those approved by Mr. Bates and other learned text-writers; nor those sanctioned by any other tribunal whatever will *control* this court in the matter of the procedure and processes which it may deem necessary and proper to adopt, in order to attain the ends of justice.

This results from the very nature of its powers and duties in a case like this, as to which its jurisdiction is not only exclusive, but final, plenary and absolute.

In this its only rule upon the subject, the court has indicated the former practice of the courts of chancery in England as

"affording outlines" for the practice of this court in chancery causes.

If we look to the practice of the English courts in chancery, and to the chancery practice sanctioned by the courts and jurists of this country, precedents and authorities will be examined in vain to find any sanction for the proposition that each of the six rules laid down by Mr. Bates in the section quoted in the brief for West Virginia, must be complied with before there can be a decree for an account in a case like this; nor are we willing to believe that the learned counsel for the defendant would carry their contention to any such extremity.

2 Daniel's Chy. Pl. & Pr. (5th Ed.) p. 1004 and note 7;
Adam's Equity (8th Ed.) Book III, Chapter 1, M. pp. 220 to 222-226;
Story's Eq. Pl., Sec. 218 & note (b);
1 Story's Eq. Jurisprudence (13th Ed.) Chapter VIII. Titles, Account, Apportionment, and Partnership, Sections 450, 469 to 477-483-488-671.

The general rule is that a decree for accounts, or order of reference is from its nature interlocutory, because it directs an inquiry and contemplates the bringing of new and additional facts into the record. It would be practically impossible to state in advance all the principles of law which might apply to the facts as they might thereafter be developed. As if an account of debts were ordered against a partnership, corporation, or estate, it would be impracticable to state in advance what rules of law should obtain in regard to the establishment of such debts; as for instance, what might be valid defences, such as failure, or want of consideration, the statute of limitations, payment, set-off, &c., any of which might be interposed

against the different debts as presented, and no one could say in advance to what extent they might be applicable or valid.

"A decree is understood to be interlocutory whenever an inquiry as to a matter of law or fact is directed preparatory to a final decision." *Bebee* v. *Russel,* 19th How., 285, and in the same case we find the following citation from the 2nd volume of Perkin's Daniel's Chancery Practice 1193, "that the most usual ground for not making a perfect decree in the first instance, is the necessity which frequently exists for a reference to a master of the court, to make inquiries, or take accounts, or sell estates and adjust other matters which are necessary to be disposed of, before a complete decision can be come to upon the subject matter of the suit," p. 285.

The primary purpose of this suit is to invoke the equitable jurisdiction of "Account"; to have the account between the parties, involving more or less complicated transactions, made up of a vast number of items running through a period of more than seventy years, stated, in order to obtain from the defendant the amount for which she shall be thus ascertained to be equitably liable.

The principal facts upon which the complainant's claim depends, namely; the formation of the new State out of the territory of the Commonwealth of Virginia; the existence of a public debt of the undivided State of some $33,000,000.00 at and before that event, a large part of which remains an unsatisfied and binding obligation upon both States; the ordinances, public acts, and fundamental stipulations and enactments by which West Virginia assumed, and became liable for an equitable proportion of that common indebtedness,—all of these and other material facts are alleged in the bill, and are, either not controverted by the defendant's answer, or are established by the documents and public records filed with the

bill, or are a part of the history of the two States, and of the times, and of the country.

The facts which justify the complainant in instituting her suit for an accounting, and for a decree thereupon, are thus sufficiently established to entitle her to a decree to that end. Indeed, we had supposed that the decree of this court overruling the defendant's demurrer, had pretty well settled this.

If precise proof of Virginia's claim should be required to be made, before a decree for an accounting would be entered, it would be necessary for the court to devote months of its time to the examination of the books, accounts, documents, and transactions of the Commonwealth, in connection with the creation of the debt, the expenditures made in the counties now constituting West Virginia, and the payments made from those counties into the treasury of Virginia, during a period of forty years or more, and also to the examination of the records of both States in reference to the lands and other property which West Virginia received from Virginia.

It is difficult to conceive how a stronger case could be presented for the exercise of the equitable jurisdiction of "Account," "in order to bring the case to a final hearing upon the merits."

But while the case is not in a condition for the court to intelligently and fairly "pass upon all the issues made in the pleadings," it is in condition for a decree of reference, in which decree the principles upon which the account shall be stated should be settled, so far as it is practicable to do that from the data now in the record, and without doing injustice to either party.

In the draft of decree tendered on the 7th of last December by counsel for the complainant, some important questions were left open which we are prepared now on further consideration

to say, it would be as well, or better, to have settled in advance.

To this extent we concur, upon this point, in the views presented by the learned counsel for West Virginia.

While the basis of settlement prescribed by the Wheeling Ordinance is, as we have always considered it, arbitrary and inequitable, we have never taken the position that that Ordinance, *reasonably and fairly construed,* and taken and applied together with the Act of the Restored Government of Virginia of February 3, 1863, and section 8 of Article VIII of the Constitution under which West Virginia became a State, was not binding on both States.

While thus construed and applied, the amount and proportion of the public debt assignable to West Virginia will doubtless be much less than it would have been equitable for her to have assumed and paid, we are constrained to the opinion that the plan of settlement prescribed and sanctioned by the foregoing enactments is binding upon Virginia.

It is due to candor also, to say that, although it is true that the Convention which enacted the Wheeling Ordinance, was not called, constituted, or organized in accordance with the requirements of the Constitution and laws of Virginia, and was a revolutionary body; although it could then have been shown that that Convention and its acts were invalid, and may now be contended that the Convention and the Wheeling Ordinance which it adopted, were fictions, nevertheless, they and their offspring, the Restored Government of Virginia, and the State of West Virginia, have since received such recognition and sanction from every department of the United States Government, and from the Government of Virginia also, that, what, in its inception, was a fiction, has become a *legal* fiction, and now has all of the force, if not all of the virtue, of a legal verity.

We are constrained to recognize the following propositions as true:

(a) That the State of West Virginia could have no legal birth or existence without the consent of the Legislature of Virginia.

(b) That the only Legislature of Virginia which ever gave its consent to the formation of West Virginia, was the Legislature of the Restored Government which, sitting at Wheeling on the 13th of May, 1862, gave its consent to the formation of the new State, "according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th of November, 1861."*

(c) That the Act giving such consent and the Legislature which passed it, depended for their validity upon the validity of the Wheeling Ordinance under which the Restored Government of Virginia was organized.

(d) That said Convention, and its acts, and the Government which it established, have been legitimated, by recognition by every department of the Government,--by the President of the United States in his official intercourse and dealings with the Governor and officials of said Restored Government, by approving the bill for the admission of West Virginia, and by his proclamation announcing the admission of the new State into the Union; by the Congress of the United States in the admission of Senators Willey and Carlisle elected by the Legislature of the Restored Government, by the passage of the Act approved December 31, 1862, admitting West Virginia into

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*At the time of the argument upon the demurrer, counsel for complainant were under the impression that this Legislature had not been convened pursuant to the proclamation of the Governor, without which proclamation the meeting of the Legislature would have been, under the then Constitution of Virginia, invalid; but subsequently the Executive Journal of the Governor of Virginia at Wheeling, for 1862, was found, and it appears from it that Governor Pierpont issued a proclamation under which the special session of the Legislature in May, 1862, was held.

the Union, and by other acts; and by the United States Supreme Court, by its decision in *Virginia* v. *West Virginia*, 11 Wallace, p. 39, in which the Wheeling Convention and this very Wheeling Ordinance and the Wheeling Legislature of Virginia, are recognized as being a Convention, an Ordinance, and a Legislature of the Commonwealth of Virginia.

We are forced by these considerations to conclude that it too late now to question the binding effect of the Wheeling Ordinance.

Still, it cannot be forgotten that there was not a man in the Virginia, and West Virginia, Wheeling Conventions of 1861-2, and 3, from any of the counties or cities which now constitute Virginia, except the four men admitted to seats in the Virginia Convention at Wheeling, of August, 1861, two of them from Alexandria and two from Fairfax county, both parts of the present State of Virginia; that there was no pretence that there was any representation whatever in said Conventions, or in the Legislature of the Restored Government of Virginia, from more than two-thirds of the territory and people of Virginia; and that, in a number of instances, the very same men acted as the representatives both of the people of Virginia, and of the people of West Virginia, in said Conventions and Legislatures.

The indisputable facts are, that it was the people of the counties and cities now constituting West Virginia, or their representatives, who were dealing with the people of the same counties and cities, or their representatives, and undertaking to make covenants and stipulations with themselves which would bind all the people, and the entire Commonwealth of Virginia, in matters of the utmost importance to them.

Among other instances of manifest injustice in the plan prescribed in the Ordinance, is, that it operates to exclude from the

account all items of expenditure in the early years of the last century.

If the principle adopted by that Ordinance was just, why should its application be stopped in 1820?

For a number of years before that date there had been large expenditures made by Virginia in what is now West Virginia, towards which the people of that section had contributed little or nothing. For a long period after the settlement of Western Virginia, the rest of the State had practically to carry that section of the Commonwealth.

Many times as much was expended there on public account, as it contributed to the Treasury of the Commonwealth.

All that was well enough, for it was reasonably hoped that in time, with the development of the bountiful resources of that trans-mountain region and the consequent increase of its wealth, the accounts would be squared.

From the very dawn of the internal improvement policy of Virginia the dream of her leading men was the construction of some efficient line of communication between her Eastern and her Western waters.

This was earnestly advocated by Washington, and others of her representative citizens, and among these Chief Justice Marshall applied the great powers of his mind and unerring judgment in aid of a wise solution of the problem.

In 1812, at the request of the General Assembly, he devoted much of his time to arduous service as Chairman of a Commission which was created for the purpose of examining the intervening region, and ascertaining and reporting as to the best route and mode of communication between the Eastern and Western waters.

Together with other members of the Commission, the Chief Justice spent some time among the mountains and wild woods of Western Virginia, much of it then almost a trackless wilder-

ness, in the patriotic discharge of this voluntarily accepted duty.

The report of this Commission which was evidently written by the Great Chief Justice, will be filed as an exhibit in the cause, not only as indicating the purpose and desire of Virginia at that early day to open up a highway through West Virginia, but as an interesting fact in connection with the history of the internal improvement policy of Virginia.

From 1812 down to the breaking out of the war which resulted in her dismemberment, the means and energies of the Commonwealth were largely devoted to the construction of roads, turnpikes, water-ways, and railroads, and especially to lines which were designed to develop Western Virginia.

This policy generally received the earnest support of the people of what now constitutes West Virginia, and their representatives, and very little indeed of the debt would have been contracted if they had opposed it; for there was a powerful opposition to that policy and to contracting the debt in large portions of the Eastern part of the State.

As giving some notion of the views of leading and representative citizens of Western Virginia, extracts from the message to the General Assembly, of Governor Joseph Johnson, of Harrison county, West Virginia, in January, 1852, will be printed in the appendix to this brief.

These are incontrovertible facts, to which we cannot shut our eyes, unless we would ignore the truth.

We therefore respectfully submit that these ordinances and public acts, adopted under such circumstances, should not be construed strictly against Virginia, who, without the actual consent of her people, or their representatives, was to be bound by them.

On the contrary, they should be strictly construed against West Virginia, in whose interest they were manifestly conceived and made.

That the rule embodied in the Wheeling Ordinance was not only arbitrary, and inequitable, but contrary to the usages of nations, and the principles of natural equity and public law, as enunciated by the great publicists and jurists of the world, and also as expressed by learned American authors, will be manifest from an examination of the extracts from the works and opinions of a number of these authorities which will be found in an appendix to this brief.

It will be seen that the authorities there quoted, with a single exception, all substantially agree that the rule of equity applicable to such a case is, that the common debt and common assets shall be apportioned between the two States ratably.

The only exception to this practically unbroken line of authority, is to be found in Mr. Hall's treatise on International Law. With entire deference for his ability, we respectfully submit, that the views of this learned author upon this subject are unsupported by reason or authority, and are repugnant to those principles of justice and right, from which the rules of International and Public Law derive their highest sanction.

If Mr. Hall is correct, then three-fourths, or four-fifths, of a State, could, by splitting off from the original State, escape liability for the common public debt of the unsevered Commonwealth, and leave that burden to rest exclusively upon the remaining parcel thereof.

The flagrant injustice of such a rule would be the same if it should be applied to this case, the only difference here being one, not in principle, but in degree; for, here the new St embraced perhaps one-third of the actual, and one-half of the prospective and potential resources and wealth of the original State, instead of three-fourths, or four-fifths thereof, as in the case just assumed.

The debt was created by the whole State, bound the whole State, and should be paid by the whole State.

Its obligations rested equally upon the whole State, and upon every part of it, and should have been, and should now be, borne by every part of the undivided Commonwealth, whether each part has received its ratable share of the expenditures made out of the money for which the debt was contracted, or not. It would be exceedingly difficult, indeed impossible, to apportion the debt upon any basis which would require each county, or each section, or each grand division, to contribute to its payment in proportion to the benefits actually received by such county, section, or grand division—and no sanction for any such principle will be found in the writings of the publicists and jurists who have considered and discussed these questions.

But, if it be true, as is indicated in the Bill, and as it can and will be demonstrated to be true, that the public debt of the Commonwealth was created largely for the constuction of works of internal improvement which would develop the vast resources of Western Virginia then known to be lying there in boundless but almost useless affluence; that some of the most important and most expensive of these works would not have been undertaken, if it had not been believed that their construction would have that effect; that the policy under which and the acts by which that debt was contracted received the warm and active support of the people of the counties which now constitute the new State; *that a large part of that debt was contracted by the votes of a majority of the representatives from those counties, and against the wishes and the votes of a majority of the representatives in the General Assembly from the counties constituting the present State of Virginia; and that a very small part of the debt was or could have been created had the people from the counties now forming West Virginia, and their representatives in the General Assembly opposed its creation,*—if these facts which are a part of the history of the

Commonwealth, be true, how could the amount of money which was expended in West Virginia be, by possibility, any just or equitable measure of the share of that debt which, in good conscience, she should assume and pay?

Yet, by the Wheeling Ordinance, that is made the chief measure for determining the proportion of the common debt which the younger Virginia should assume and pay.

Tried by every test of authority, and every standard of principle and right, the basis of settlement prescribed by the Wheeling Ordinance, was, upon its face, arbitrary, illogical, and inequitable, and yet the learned counsel for West Virginia, would, by construction, give it a meaning which would make it work even greater hardship and injustice upon Virginia, than its language fairly interpreted would justify.

Here, then, we have an Ordinance which prescribes a plan of settlement, palpably unjust and inequitable, and in contravention of both common right, and of the common public law of the civilized world.

Such an enactment clearly comes within the time-honored rule, that a statute in derogation of common right or of common law must be strictly construed—and so construed as to conform it in its operation and effect, to the principles of right and justice and of the common law, so far as this can be done without violating the manifest *expressed* purpose of the statute.

See this Rule as applied to Acts in derogation of the common law.

> Enlich on Interpretation of Statutes, §127, citing *Brown* v. *Barry* 3 Dall., 365, 367; *Shaw* v. *R. R. Co.*, 101 U. S., 557; *Newell* v. *Wheeler*, 48 N. Y., 476; and a number of other cases.

This salutary rule, especially as to statutes in contravention

of common right, but also as to those in derogation of the common law, is embodied in the jurisprudence of both Virginia and West Virginia.

Commonwealth v. *Gaines,* 2 Va. Cases, 172-175.
Richmond City v. *Daniel,* 14 Gratt., 485, 487.
Delaplain v. *Crenshaw,* 15 Gratt., 457, 470.
Virginia & S. W. R. R. Co. v. *Clower,* 102 Va., 867, 871.
Wheelright v. *Commonwealth,* 103 Va., 512, 519.
Davis v. *Commonwealth,* 17 Gratt., 617.
Alexandria & Fredericksburg R. R. Co. v. *Alexandria & Washington R. R. Co.,* 75 Va., 780, 788.
Harrison v. *Leach,* 4 W. Va., 383.
Harrison v. *Smith,* 4 W. Va., 97.
Pendleton v. *Barton,* 4 W. Va., 496.
McGugin v. *O. R. R. R. Co.,* 33 W. Va., 63, 68.
Richardson v. *N. & W. R R. Co,* 37 W. Va., 641.

To the same effect are a large number of decisions of other States, a few of which are:

Webb v. *Baird,* 6 Ind., 13.
Sewall v. *Jones,* 9 Pick., 412.
Mayor of Savanah v. *Hartridge,* 8 Ga., 23.
Chapin v. *Persse & Brooks Paper Works,* 30 Conn., 461.
Phillips v. *Dunkirk R. Co.,* 78 Pa. St., 177.

By the express terms of the 9th Section of the Wheeling Ordinance, it was provided that:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained," &c.

That is the paramount and controlling mandate and stipulation of the clause which prescribes the portion of the debt which the new State shall assume and pay.

Our insistence is, that the residue of the clause should be so construed as to give effect to the righteous principle thus expressly made the rule by which West Virginia's liability under it shall be determined.

The enactment should be interpreted and applied so as to to defeat that purpose, *ut res magis valeat quam pereat.*

And so, whenever in stating the account between the two States under the provisions of the Ordinance, a question shall arise as to whether a particular item of charge against West Virginia shall be included in the account, such construction should be given to the Ordinance as will tend to place upon the new State a just proportion of the common indebtedness, rather than a construction which will tend to exonerate West Virginia from her just and equitable share thereof.

In other words, in the application of the arbitrary basis prescribed by the Ordinance, Virginia should, according to the equitable rules of construction which are especially applicable to this case, be given the benefit of every reasonable doubt.

If the construction and effect, which, as we understand their position, opposing council advocate, be given to that Ordinance, the Act of February 3, 1863, and to Section 8 of Article VIII of the first Constitution of West Virginia, the result will be one of palpable wrong and injustice to Virginia.

The whole Wheeling Ordinance will be found printed in full in the appendix to the opening brief of counsel for Virginia, upon this motion.

Its provisions and the language in which they were formulated, were manifestly the work of intelligent and able lawyers.

It fully specifies the terms upon which Virginia authorized

the formation of the new State,—terms which having been recognized as being in the nature of things fundamental, and upon the acceptance of them, and the formation of a new State under them with the sanction of Congress, they became contractual, and operated as a covenant binding both States.

As a necessary corrollary to this, there results this now self-evident truth, namely, that no additional or new term could be added to that Ordinance, without the consent of Virginia.

While it is true that the opening brief of counsel for Virginia, upon this motion, did not accept the basis prescribed by the Wheeling Ordinance as having been *irrevocably* fixed, as the one by which the settlement must be made, and intimated that in the event that it should turn out upon the application of that scheme of accounting to the facts of the case, that it would "lead to absolutely unconscionable results, and operate to impair the obligation of the contracts by which the common debt was created, contracts which were obligatory alike upon Virginia and West Virginia, or for any other valid reason, then the scheme of settlement indicated by the Wheeling Ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted."

In other words, if the basis prescribed by the Ordinance should, when applied, produce results which would shock the moral sense of mankind, and operate a fraud upon Virginia and the common creditors of both States, then it would be right for the court to adopt some other basis.

But the statement above quoted is immediately followed by this qualifying paragraph:

> "It is due to frankness to say, that, while the Wheeling Ordinance upon its face, prescribes an absolutely arbitrary basis of settlement, the representatives of Virginia are

satisfied, that upon a fair, reasonable, and just construction of the language of that ordinance, and of the subsequent supplemental enactments, the scheme of settlement therein defined will, when applied to the facts as stated in the bill, and as it is believed they can be established by proofs, result in fixing the proportion of the debt of Virginia which West Virginia should assume and pay, inclusive of interest, at a very large sum, though not so large a sum as it would be equitable for West Virginia to pay."

Farther investigation and consideration convince the representatives of Virginia and her counsel that fairly construed and applied, as we believe they must be construed and applied by a court of equity, the Ordinance and the constating Acts which constitute as much a part of the plan of settlement adopted by the two States, as does the Ordinance itself, will not lead to any such unconscionable results, as would appear to be inevitable particularly if the Ordinance be taken by itself.

It may be that the framers of those instruments built fairer than they intended. It is pretty certain that they built fairer than they knew.

Clause III, pp. 6 to 8 of the opening brief upon this motion, succinctly and frankly states the position of the complainant in reference to the scheme of settlement which we seem to be shut up to.

The following quotation from that clause (p. 7 of opening brief):

"As was indicated by this court in its decision overruling the defendant's demurrer, the Wheeling Ordinance, and Section 8 of Article VIII of the first Constitution of

West Virginia, must be taken and read together: So also these constating acts of February 3, and 4, 1863, and particularly of February 3, 1863, must be taken and read together with Section 9 of the Wheeling Ordinance, and with Section 8 of Article VIII of the first West Virginia Constitution, *as together prescribing the terms and conditions on which the consent of the Commonwealth was given to the formation of the new State out of her territory, and the transfer to that new State when formed of any portion of the assets and property of the parent State.*"

correctly expresses the views of complainant and her counsel upon this question, as the same are stated in the Bill, in the oral arguments and printed briefs of counsel for complainant upon the questions arising upon the demurrer, and as now stated in this brief, and as, in principle at least, sanctioned by the opinion of the court upon the questions raised by the demurrer.

Various questions are suggested by the brief of the distinguished counsel for West Virginia, in respect to the meaning and effect of that Ordinance, and the basis, and principles upon which the accounts between the two States should be stated, and the settlement between them made, which questions we agree should be now determined by the court, and directions given to its Master accordingly, so far as it is practicable to do so without working injustice.

These questions will be now considered:

I.

The first of them which we ask the court now to decide is: Whether West Virginia is not justly and ~~largely~~ legally chargeable with interest?

In this connection, we must remember that the contract which we are considering was a Virginia contract.

Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation,—and whenever a debt is due, the debtor is bound to pay interest unless relieved from this obligation by agreement. This is, and has been the law of the Commonwealth for more than one hundred years.

In *Jones* v. *Williams,* 2 Call, 106, decided in 1799, Edmund Pendleton, who was one of the great Judges of our country, delivering the opinion of the court said:

> "Interest is allowed because it is natural justice that he who has the use of anothers money should pay interest for it."

Cited with approval in *Baker* v. *Morris,* 10 Leigh, 284, *McVeigh* v. *Howard,* 87 Va., 599, and *Stuart* v. *Hurt,* 88 Va., 343.

In *Hatcher* v. *Lewis,* 4 Randolph, 152, 157, the court laid down the rule in the following expressive language:

> *"The interest follows the principal as the shadow does the substance."*

In *Chapman* v. *Shepherd,* the court said:

"In contracts for the payment of money, interest is not given as damages at the discretion of the court, or jury, but as an incident to the debt, which the court has no discretion to refuse."

Chapman v. *Shepherd*, 24 Gratt., 377, 384.
Roberts v. *Cocke*, 28 Gratt., 207.
Tidball v. *Shenandoah National Bank*, 100 Va., 741.

"Interest is favored both by the legislative and judicial bodies of the State."

Tazewell v. *Saunders*, 13 Gratt., 354, 370.

In *McVeigh* v. *Howard*, the Supreme Court of Appeals of Virginia said: 87 S.E. 599

"It is the settled rule that when no day is named in the bond or note given for the payment of a precedent debt, it is due and payable on the day of its date, and bears interest from that date, though no interest be reserved. Such an instrument like a bond or note payable, in Virginia, on demand, is payable presently, and bears interest from date. This doctrine is founded in good conscience and correct morals." * * *

Citing *Jones* v. *Williams* and *Hatcher* v. *Lewis*, quoted above.

Such is the law of Virginia as to interest.

The law of West Virginia in regard thereto is the same.

In *Shipman* v. *Bailey*, Judge Snyder, announcing the unanimous opinion of the Supreme Court of Appeals of that

State, after citing a number of authorities upon the question, stated the rule as follows:

> "Other authorities of the same character might be cited, but, we think, we have given sufficient to establish the rule, which seems to be, that in contracts for the payment of money interest on the principal sum is a legal incident of the debt and a part of the contract, and wherever there is a contract for the payment of a specified legal rate of interest, whether such rate is fixed by the contract itself or by the law of the place where the contract is made, the obligation of the contract extends to the payment of such interest as fully as it does to the principal sum, and courts have no more power to change the rate of interest thus fixed, than they have to dispense with the enforcement of the contract either in whole or in part."

Shipman v. *Bailey*, 20 W. Va., 140, 146.

That decision reaffirms another proposition, applicable to this case, already a part of the jurisprudence of West Virginia, by the adjudications of the Supreme Court of Virginia rendered before the birth of the new State, namely, that the *lex loci contractus* controls in the matter of the interest chargeable against a debtor.

In *Pickens* v. *McCoy*, the court affirms *Shipman* v. *Bailey*, and adopts the language just quoted from that decision. 24 West Va., 344-352.

Independently of these West Virginia decisions, such parts of the common law, and of the laws of the State of Virginia as were in force on the 20th of June, 1863, when the first Constitution of West Virginia went into operation, and as are not repugnant to said Constitution, were continued and declared to

be the law of West Virginia. Section 8 of Article XI of the first West Virginia Constitution.

The effect of this provision was to adopt for the new State the body of the common and statute laws of the Commonwealth, so far as the same were in force within the boundaries of the new State on the 20th of June, 1863.

As part of this body of laws, the law of Virginia as to interest became, and has continued to be, a part of the laws of West Virginia.

Such, then, was the law of Virginia before, at the time of and since the formation of West Virginia, as to the legal and equitable liability of a debtor or contractor to pay interest. Such has been the law of West Virginia since the hour of her birth. And such was, and is, the law of the contract evidenced by the public Acts of Virginia and West Virginia set forth in complainant's Bill.

The framers of the Wheeling Ordinance must be presumed to have drawn that instrument with reference to the principle of equity and justice which had then and long before that time been embodied in the laws of Virginia by the repeated decisions of her highest court.

To Virginia lawyers of that day, as since that time, Judge Coalter's apt formula of the doctrine that, "the interest follows the principal as the shadow does the substance," was as familiar as any other accepted rule of equity or of law.

Under the law of Virginia in force at the time of these transactions, interest upon the portion of the debt which West Virginia was to take upon herself, was an essential incident of the debt, and its payment as much a part of the obligation as was the payment of the principal.

But, even if the *lex loci contractus* had not brought us to this conclusion, the language of the ordinance itself, fairly construed, leads to the same result.

That language is that:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," &c.

Now, that debt was an interest bearing debt. It was represented by obligations of the undivided State, some of them payable at a future day, some of them at a future day and thereafter at the pleasure of the Commonwealth, but all of them interest bearing obligations, obligations in which the payment of the stipulated interest was made as much a part of the debt as was the payment of the principal.

The interest was as much a part of the debt as was the principal, and as many of the bonds were payable thirty-four years after date, and some of them at the pleasure of Virginia with interest from date, the interest as to much of the debt constituted much the greater part of it.

It was the manifest intention of the enactors of that Ordinance, unless we are to ascribe to them the sinister purpose of perpetrating flagrant wrong and injustice upon Virginia, that the new State should take upon itself, and relieve what remained of the old State of a part of the burden of debt which rested upon both States. They knew that that burden consisted as well of interest, as principal, and as much, or more, of interest than of principal.

It was not proposed that the new State should, as soon as she became a State, pay in cash a sum to be ascertained in the manner indicated in the Ordinance. The framers of the Ordinance understood too well that, under the conditions then existing, it would be impossible for the new State to raise and pay any considerable sum in cash.

Why, the new State was dependent upon the old State for

the money necessary to enable her to begin business, and she did not have, and in the nature of things could not command, a sufficient amount in cash to pay off one-fifth or even one-tenth of the then Virginia debt.

The stipulation was not that the new State should pay a sum in cash on account of its share of the common indebtedness; but that it should take upon itself a just proportion of that debt, to be ascertained as in the Ordinance prescribed.

Are we to understand that a court of conscience is to be asked to construe that stipulation to mean that the new State shall take upon itself only a proportion of a part of that debt? That it shall assume a share of the principal only of the debt, but shall be exonerated from any part of the interest which was, and is, as integral a part of the Virginia debt, and of the obligations which represent it, as the branches are a part of the tree from whose trunk they spring?

In their very elaborate reply brief upon this motion, opposing counsel devote very little attention to this important question, although it was plainly in their minds when they prepared their draft of decree, and although their attention was challenged to it by the opening brief for Virginia. There is some discussion of the question at pp. 35 to 37 of their brief, but that discussion ignores the facts and the principles upon which West Virginia's legal, "equitable," and "just" obligation to assume and pay the interest as well as the principal of her share of the debt, rests.

But West Virginia's equitable and legal liability to pay interest upon her share of the debt of Virginia does not depend alone upon the Wheeling Ordinance, or upon the law of Virginia and of West Virginia which makes the interest an essential part of a debt; but it rests also upon the express terms of the Constitution under which West Virginia became a State.

Now, by the Act of the Virginia Legislature at Wheeling,

of May 13, 1862, the validity of which we no longer question, for reasons hereinbefore stated, Virginia gave her consent to the formation of the new State out of her territory, "under the provisions set forth in the Constitution for said State of West Virginia and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th day of November, 1861."

It is true that this consent was predicated upon West Virginia's being erected into a State under the provisions of that identical Constitution, without the performance of which condition that consent was abortive and ineffectual.

The fact is, that at the behest of Congress, that Constitution was subsequently amended in a material particular, which change, unless objection thereto had been waived, or the change assented to by the Legislature of Virginia, would have rendered the previous conditional consent null and void.

But since the opening brief upon this motion was filed the counsel for Virginia who writes this brief, has discovered the following joint resolution, which it seems was adopted by the Legislature of Virginia at Wheeling, on the 9th of December, 1862:

> "No. 2. Joint Resolution requesting the House of Representatives of the United States to take up and pass without amendment, the bill for the admission of the State of West Virginia, passed by the United States Senate on the 10th of July last.
>
> Passed December 9, 1862.
>
> *Resolved,* That feeling the greatest anxiety and interest in the successful issue of the movement for a new State in West Virginia, we earnestly request the House of Repre-

sentatives of the United States to take up and pass, without alteration or amendments, the bill which passed the Senate of the United States on the 10th of July last."

See "Constitution and Statutes Va. & West Va., 1861-66."

This resolution was telegraphed to Washington on the evening of the day on which it was passed. History of West Virginia by Lewis, p. 389.

The Senate Bill referred to in the resolution was taken up in the House of Representatives, and passed on the 10th of December, and was approved by President Lincoln and became a law on the 31st of December, 1862, in the very form in which the Legislature of Virginia had by its Joint Resolution of the 9th of December, 1862, requested and urged that it should be passed.

This Act of Congress to which the Legislature of Virginia had thus given its assent, made it a condition of the admission of the new State into the Union, that its proposed Constitution should be amended in the particular in which it was afterwards amended by the Convention and people of West Virginia, in regard to the emancipation of slaves.

The effect of said Joint Resolution, was, under these circumstances, to waive any objection by the Legislature of Virginia to the amendment made to the Constitution of West Virginia at the instance of Congress, and to make the consent given by the Act of May 13, 1862, effective, notwithstanding that amendment.

What, then, was the effect of the admission of West Virginia to the Union under the consent thus given, and the Constitution upon which that consent was predicated?

It will not be denied that the condition upon which the consent of the Legislature of Virginia was given to the formation

of West Virginia and her admission into the Union as a State, was, that she should become a State under the provisions of the Constitution under which her statehood was sanctioned by Congress.

Among the most important of those provisions, so far as Virginia was concerned, were those expressed in Article VIII of that Constitution in reference to the public debt.

Section 8 of that Article reads as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

We have a right to assert that, unless West Virginia had been required to assume and pay an equitable proportion of the Virginia debt in manner and form as was expressly prescribed in this Section, the consent of the Legislature of Virginia would never have been given to the creation of the new State.

These were, therefore, fundamental conditions of West Virginia's existence.

By accepting these conditions, the new State became bound in equity and in law to perform them in good faith.

Upon grounds which have been already indicated, as sufficient and controlling we are constrained to concede that Section 8 of Article VIII of the first West Virginia Constitution, and Section 9 of the Wheeling Ordinance being *in pari materia*, must be read together, and that the proportion of the debt which the new State was required by this provision of her Con-

stitution to assume, was to be ascertained in the manner prescribed by the Ordinance.

But the Constitution goes farther, and expressly provides as to the equitable proportion of the debt which West Virginia should assume, that her Legislature should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This was precisely in accordance with the plan which had long theretofore been adopted by the Commonwealth for the payment of her debt.

This plan was embodied not only in the statutes, but also in the Constitution of Virginia in force when West Virginia, became a State.

It was embodied in that Constitution in the following terms:

> "29. There shall be set apart annually, from the accruing revenues, a sum equal to seven per cent. of the State debt existing on the first day of January in the year one thousand eight hundred and fifty-two. The fund thus set apart shall be called the sinking fund, and shall be applied to the payment of the interest of the State debt, and the principal of such part as may be redeemable. If no part be redeemable, then the residue of the sinking fund, after the payment of such interest, shall be invested in the bonds or certificates of debt of this Commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the State debt as it shall become redeemable. Whenever, after the said first day of January, a debt shall be contracted by the Commonwealth, there shall be set apart in like manner, annually, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid

thereon at the time of its contraction; which sum shall be part of the sinking fund, and shall be applied in the manner before directed. The General Assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection or invasion."

Section 29 of the Constitution of Virginia, in force from January 1, 1852, Code of Virginia for 1860, p. 47.

It was expressed in a concrete form and given further effect by the second Section of the following Act passed by the General Assembly of Virginia:

"Chap. 17.—An Act establishing a sinking fund and providing for the payment of the semi-annual interest on and redemption of the public debt.

Passed March 26, 1853.

* * * * * * * * * * * * * * * * *

"2. Whenever after the said first day of January, eighteen hundred and fifty-two, a debt shall be contracted by the Commonwealth, there shall be set apart, in like manner, annually for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction, which sum shall be part of the sinking fund, and shall be applied in the manner hereinbefore directed."

* * * * * * * * * * * * * * * * *

Acts of General Assembly of Virginia, Session of 1852-3, p. 29.

Its effect was, therefore, well understood to be to conform the undertaking of West Virginia in regard to the time and manner of the payment of her share of the debt to the plan and scheme of payment which had been adopted by the Commonwealth, and which experience had approved.

That scheme was the creation from the annual revenues of the State, of a fund equivalent to seven per centum of the principal of the debt.Of this, six per centum went to pay the annually accruing interest, and one per centum was invested and set apart to retire the principal sum due, within thirty-four years, and this arrangement was defined as a sinking fund.

It was found, and if the calculation is made it will be shown to be true, that one *per centum* of any sum invested and compounded at six *per centum* interest per annum, will in thirty-four years produce an amount equal to such sum.

This was the theory and the plan which Virginia had adopted for the liquidation of her debt.

It was a plan with which Messrs. Willey, Van Winkle, Hall, Brown, Haymond, and other members of the first West Virginia Convention, who had been previously members and some of them able members of the General Assembly of Virginia, were doubtless entirely familiar: And it is the same plan which we find incorporated in the scheme of settlement which constitutes a part of the foundation upon which West Virginia's existence as a State rests.

By this clause of West Virginia's Constitution, therefore, it was required, not that the new State should pay a lump sum in cash, to be ascertained in the manner prescribed, but that she should *assume* "an equitable proportion of the public debt of the Commonwealth" existing on the 31st of December, 1860, and should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

The framers of the West Virginia Constitution thus manifestly adopted, and engrafted upon that instrument, the plan which for nine years or more had been a part of the organic and statutory law of Virginia for the extinguishment of her public debt, and the Legislature of Virginia accepted and approved that plan.

That plan included, (as the West Virginia Constitution also expressly included), an undertaking on the part of the Commonwealth to pay the accruing interest, and to liquidate or redeem the principal of each bond representing the debt, within thirty-four years.

(This statement is subject to this qualification, that as to a considerable portion of the debt, particularly that contracted prior to 1852, like English consols, the principal was redeemable at the pleasure of Virginia).

In simple language, the stipulation of West Virginia expressed in her Constitution, and accepted and acted upon by Virginia, was, that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the principal thereof within thirty-four years.

That such was her express undertaking, appears from the language of her first Constitution, interpreted according to the reasonable and natural meaning of that language.

That such was the purpose, meaning, and effect of that language, is conclusively shown when we read it in the light of the plan established by the Constitution and statute of Virginia, then in force, for the establishment of a sinking fund for the liquidation of her public debt, which plan was adopted by the new State as to its share of that debt.

And so, we find that both by the express terms of the Wheeling Ordinance fairly construed, and by the express terms of the Constitution under which Virginia and the National Congress consented that West Virginia should become a State, this

new State has become expressly obligated to pay interest upon the share of the principal of the common public debt for which she is liable. U. S. v North Carolina, 136 U. S. 211

Another question which arises in connection with the consideration of this subject, is, from what time is West Virginia justly and equitably bound to pay that interest?

Answer to this is furnished by the Wheeling Ordinance and by the Section of the first West Virginia Constitution above quoted.

The settlement by the terms of both instruments was to be made as of the arbitrary date of January 1, 1861, or to be precisely accurate, as of December 31, 1860. That, accordingly, is the date from which fairly, equitably, and legally, (because it accords with the express terms of both the Ordinance and the Constitution) the interest should be computed.

As already shown, the debt, a proportion of which as of that date, West Virginia was to assume and pay, was an interest bearing debt, and the interest was as integral a part of it as was the principal.

A farther kindred inquiry to the last is: To what time should West Virginia be required to pay such interest?

Our response to this is, that she is justly, equitably, and legally bound to pay this interest,

(1) By the terms of the Wheeling Ordinance, certainly, for the period during which the debt of the Commonwealth existing on the 31st of December, 1860, would continue to be an interest bearing debt: And we have seen that that was not only until the obligations representing the debt became due, but under the just rule of the law of Virginia as to interest, in force during the whole period of the creation of the debt, until that principal should be fully paid.

(2) By the terms of the Section of her Constitution above quoted, West Virginia undertook that her Legislature should

assume and pay the accruing interest and the principal of her share of that debt in thirty-four years.

Her Legislature has failed either to assume, or to pay that share, or any part of it.

The interest accruing thereon from December 31, 1860, has continued to accrue, as to her, until it now amounts to vastly more than the principal. It was that interest which West Virginia agreed to pay, and it was that principal for the payment of which West Virginia's Legislature was to make provision, so that the same should be paid within thirty-four years.

We are unwilling to anticipate that the learned and fair-minded counsel for the defendant will argue that West Virginia, by the language of that provision of her Constitution, is only bound to pay interest for thirty-four years from December 31, 1860, or from June 20, 1863, because we are unwilling to assume that our distinguished opponents would contend that a State, any more than an individual, should be allowed to take advantage of her own wrong, or profit by her own procrastination, and neglect of duty.

Here, West Virginia has not only not taken upon herself a just, or any other proportion of the common public debt, nor provided for the payment of the accruing interest thereon, and for the payment of the principal, but she has persistently failed and refused to do either of these things, and has by the votes of her Legislature, repeatedly repudiated any and all liability whatever for any part of that indebtedness.

(See Resolutions of Legislature of West Virginia in Appendix).

With all deference for the distinguished counsel for the defendant, we venture to believe that a court of equity will not allow any defendant, and particularly a State, which should be

an exemplar of fair and honorable dealing in all of its transactions, to make gain out of its own palpable dereliction of duty.

And so, our response to such contention, if it shall be urged is, that equity will not suffer any party to take advantage of his own wrong.

Here, fortunately for West Virginia, it will, by reason of her increased wealth and prosperity, be far easier for her to pay the principal and the accumulated interest now, than it would have been to have paid the interest annually as it accrued, and the principal thirty-four years from 1861, or 1863. West Virginia could pay thirty million of dollars now, with as little inconvenience as she could have paid three or four millions thirty-five or forty years ago.

If there ever was a case to which the benign doctrine of Virginia law, that "interest follows the principal as the shadow does the substance," should be applied; we seem to have such a case here.

Nor is there any extravagance in the language of our opening brief upon this motion, when we say that,

> "any settlement which does not require that State to pay interest during the long period of her default and refusal to pay anything, would be not only unjust and inequitable, but iniquitous."

II.

The Wheeling Ordinance provides; that in ascertaining the just proportion of the debt which the new State shall take upon itself, it shall be charged with;

> "all the State expenditures within the limits thereof,

and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included in said new State during said period."

There cannot well be any question as to what will be included in the first item of the debit charge against the new State under this language. It includes all expenditures of whatever kind made by Virginia in any part of the territory embraced in the new State, since any part of the debt was contracted. There will be no controversy as to the earliest date when any part of the debt existing on the 31st of December, 1860, was contracted.

Part of the debt, then unpaid, was created as far back as 1820. So, the period covered by the account will be from, say, January 1, 1820.

There is likely to be some question as to what shall be regarded as under the circumstances, a just proportion of the ordinary expenses to be charged to West Virginia.

As to the criterion on which the apportionment of the expenses of government should be made, if that is to be the population, we respectfully submit that in this case it should be the free populations—the citizenship—and not the total of the free and the slave population. The care and policing of the slaves cost the State little or nothing. Those matters were regulated by their masters on the plantations. Of course, none of them could vote; but upon the "mixed basis" of representation which was partially adopted in Virginia, they counted to some extent in fixing the basis of representation in the General Assembly; that is, five negroes counted as much as three white men, where the mixed basis prevailed.

The debt was contracted solely by the votes of the white popu-

lation or their representatives. It was expended by them or under laws of their enactment. The taxes were levied exclusively upon the property of the free population; and the revenues were appropriated and expended as they directed, and exclusively for their benefit.

The negroes did not constitute a part of the citizenship of the State during any part of the period when the debt was contracted, or the money realized from it was expended; nor were they any part of the body politic.

Under these circumstances we would submit as a just criterion for such apportionment the white population of the territory embraced in West Virginia, and of the territory still remaining to the Commonwealth, at the times when the expenditures to be apportioned were made.

However, there is not probably, as yet, enough in the record to enable the court to decide this question intelligently; or satisfactorily.

III.

Another and quite an important question which can probably be fairly considered and decided, upon what is now in the record, and which should be decided now, if a just conclusion about it can be reached at this time; is, whether West Virginia shall be charged, in the settlement to be made, with the property or assets which she has received from the Commonwealth?

The Act of the Virginia Legislature at Wheeling, of February 3, 1863, which is printed in the appendix to the opening brief for Virginia on this motion, expressly provides that "the new State shall duly account for the same in the settlement hereafter to be made with this State." See Section 5 of the Act of February 3, 1863.

Counsel for West Virginia deny that these important items

shall be brought into the account; and in order to have any ground on which to base their objection, they contend that the Acts of February 3 and 4, 1863, were not binding upon West Virginia; that her rights were determined by the Wheeling Ordinance, and by the provisions of her first Constitution, and by the Act of May 13, 1862, of the Virginia Legislature at Wheeling, and the Act of Congress approved December 31, 1862, giving the consent of the Congress to the formation of the new State and her admission to the Union; that these Acts were all effective, and the rights of the new State definitely determined by them before the Acts of February, 1863, were passed; and that those Acts of the Virginia Legislature of February 3 and 4, 1863, were not binding upon West Virginia, and imposed no obligation upon her, because she had already, by reason of the consent given by Virginia to her statehood, been absolutely vested with the very rights which the Act of February 3rd, undertook to confer upon her upon conditions.

The answer to this argument, vigorously and ably as it is presented, is complete.

The position of the counsel for the defendant upon this point would find support in the doctrine laid down by Mr. Hall, *if there had been no agreement between Virginia and West Virginia as to the terms upon which the partition of the old State should be made, and the debt thereafter apportioned between the two States;* but neither Mr. Hall, nor any other authority will be found to sanction the proposition, that, where a new State has been erected out of the territory of the old State by treaty or by a convention between the mother State and the new State any such doctrine applies.

The rule in that case logically, and necessarily is, and must be, that where the two States have undertaken to define and prescribe the terms upon which the new State shall be created, the rights and obligations of the two States will thereafter be

determined absolutely by the stipulations and provisions of such treaty or convention.

The elementary rule of universal application, that a party will not be allowed to add to, or to take from, the terms of a valid written instrument applies with intensified force to a compact between two sovereign States.

The Wheeling Ordinance, which taken together with the first Constitution of the State of West Virginia; the Act of the Virginia Legislature at Wheeling, of May 13, 1862, giving the consent of the Legislature of Virginia to the formation of the new State under the provisions of that Constitution, and the Act of Congress approved December 31, 1862, giving the consent of Congress to the creation of the new State and to her admission into the Union, constitute a compact; and to this compact no new term can be added, and no term prescribed therein can be taken away.

Now, the Wheeling Ordinance, and the article of the Constitution of West Virginia referred to, are absolutely silent upon the subject of the property and assets of the Commonwealth of Virginia. While the Wheeling Ordinance, with the greatest particularity, undertakes to prescribe and define minutely the terms upon which the new State shall be created, its boundaries, and the rights of property of individuals residing therein, it makes no provision whatever in respect to property held by Virginia in her corporate capacity, whether it be personal or real. As a necessary effect of the terms of that Ordinance, the title and ownership to that property remained, after its enactment, and after the formation of the new State of West Virginia, just where they were vested before the Ordinance was enacted; and that is, in the Commonwealth of Virginia.

As already indicated no new term can be incorporated in, or added to, that Ordinance, without the consent of Virginia;

and yet, the learned counsel for the defendant would have the court, by a forced construction to interpolate a new term into this Ordinance which was, as we have a right to assume, intentionally excluded from it by the parties who framed it.

If there is any contract or covenant to which the doctrine of *expressio unius est exclusio alterius* ought to apply, it is to a compact like this between States, and affecting the rights of the people of those States for all coming time.

The men who framed the Wheeling Ordinance and the Constitution of West Virginia among whom were evidently lawyers of a higher order of ability, intelligence, and learning, must have fully realized the meaning and effect of the Wheeling Ordinance, and must have known that it did not transfer to the new State any title or ownership in respect to any of the property and assets which Virginia owned in her corporate capacity; for we find that they, or some of them, were instrumental in the enactment of the Act of February 3, 1863, which undertook to cure this omission, which was doubtless an intentional omission, and to vest in the new State the property and assets of Virginia, the situs of which was within the limits of the new State, upon the just and equitable terms that the new State should account in that settlement for the value of all such property, in the settlement to be made between the two States.

The only settlement to be made between the two States, was the settlement in regard to the public debt; and the purpose of the Act of February 3, 1863, was to provide that the new State should account for the value of the assets and property which she should acquire from Virginia under that Act.

The Legislature of Virginia at Wheeling had the right to exercise supreme dominion over the territory and people of West Virginia at the time that the Act of February 3, 1863, was passed; subject only to the limitations of the Constitutions

of Virginia, and of the United States; so that the Act of February 3, 1863, was clearly within the competency of the Legislature of Virginia to enact; nor can we be blind to the fact that the portion of the territory of Virginia which was represented by Senators and Delegates in the Legislature at Wheeling, was practically coincident with the territory of the proposed new State of West Virginia; so that, it was in fact the representatives of the people who were about to form themselves into the State of West Virginia, who enacted the Act of February 3, 1863.

Upon these grounds, we can fairly claim that the Act of February 3, 1863, was a valid law, and binding upon the people who afterwards constituted the State of West Virginia.

But that Act has still farther sanctions which make it absolutely binding upon the people of West Virginia.

The 8th Section of Article XI of the first Constitution of West Virginia is as follows:

> "8. Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation; and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature." * * *
>
> Article XI, Section 8, 1st West Virginia Constitution; effective June 20, 1863.

We respectfully insist that the effect of this provision of the Constitution was to sanction and continue in force the Acts of February 3 and 4, 1863, both of which were in force within the boundaries of the State of West Virginia at the time that that Constitution went into operation.

But this Act of February 3, 1863, has received still farther and express sanction and acceptance by a positive enactment of the Legislature of West Virginia. Section 8 of the Act of the Legislature of West Virginia, approved December 20, 1875, Acts of the Legislature of West Virginia, Session of 1875, p. 126, is as follows:

> "8. The Auditor shall institute all the necessary and appropriate measures for the collection of all claims for taxes and other demands transferred by the Commonwealth of Virginia to this State by an act of the General Assembly of said Commonwealth entitled 'an act transferring to the proposed State of West Virginia, when the same shall become one of the United States, all the State's interest in property; unpaid and uncollected taxes, fines; forfeitures, penalties and judgments in counties embraced within the boundaries of the proposed State aforesaid;' passed on the third day of February, 1863."

And therefore, we respectfully, but earnestly, claim that West Virginia is equitably, legally, and justly, bound to account for all property and assets, whether real or personal, which she has received from the Commonwealth of Virginia; in the settlement which it is the object of this suit to bring about.

There is, we think; enough in the record to show that no equitable settlement can be made between the two States upon the basis of the Wheeling Ordinance and the constating Acts referred to, unless there shall be brought into the account with West Virginia a fair charge against her for such assets, money, or property as she has received under the Acts of February 3 and 4, 1863, and upon the fullest examination and consideration which we have been able to give to the subject.

we are satisfied that even then the amount with which West Virginia will be chargeable on account of the public debt of the undivided State, will be far less than she ought to have assumed and paid if we have reference to all of the facts, and all of the equities of the case.

It is proper to state here that in so far as any property or money which West Virginia acquired from Virginia, either under the Acts of February 3 and 4, 1863, or otherwise, was property which was acquired by Virginia by the expenditure of money within the limits of the State of West Virginia, or money paid by Virginia, after 1819, the new State will, of course, be chargeable with the amount so expended or paid by the Commonwealth, under the Wheeling Ordinance, and not under the Act of February 3, 1863, in the settlement to be made between the two States, for the Wheeling Ordinance provides that the new State shall be charged with all expenditures made within its limits by the Commonwealth of Virginia, since any part of the debt was contracted.

Counsel for Virginia will file a modified draft of decree in conformity with the views presented in this brief; which we will respectfully ask the court to consider, and to enter, if they shall approve the same.

Respectfully submitted

WILLIAM A. ANDERSON,
Attorney General and as such Counsel for Virginia.

APPENDIX No. 1.

To Reply Brief for Complainant on motion for order of reference in *Virginia* v. *West Virginia.*

The doctrine of the apportionment of the public debt of a State, which is divided into two or more States.

Grotius states the principle as follows:

> "On the other hand it may happen that what has been one State, is divided, either by mutual consent or by hostile force, as the body of the Persian Empire was divided among the successors of Alexander.. When this transpires, several sovereignties exist instead of one, each with its own rights; *but if anything had been in common; that ought either to be administered in common, or divided in portions pro rata.*"
>
> Grotius' Book II; Chapter 9; Section 8.

And Puffendorf says:

> "Where a kingdom divides by common consent into two or more distinct Commonwealths, the public patrimony with all the debts and incumbrances upon them, ought to be equally shared among them. Tho' indeed when such separations are made by mutual agreement, there is commonly express provision made for such cases."
>
> Puffendorf's Law of Nature & Nations, Book VIII, Chapter 12; Section 5.

Chancellor Kent thus concisely states the doctrine:

> "If a State should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement, those rights are to be enjoyed; and those obligations fulfilled, by all the parts in common."
>
> 1 Kent's Comm. pp. 25-26.

Phillimore thus clearly states the rule:

> "If a nation be divided into various distinct societies, the obligations which had accrued to the whole before division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts."
>
> 1 Phillimore International Law, Part II, Chapter 137, M. p. 158.

Pomeroy expresses the rule in the identical language of Mr. Phillimore.

Pomeroy's International Law, Section 74.

Mr. Dana expresses himself as to one phase of the doctrine as follows:

> "In the separations and re-arrangments of nations in Europe, special provisions are usually made for the payment of public debts; and the principle seems admitted; that, in case of a division of a State, each new State is bound for the whole debt contracted by the former; and; in the case of a union of States; it seems equally clear that, as the whole must defend the part in war which is

the international process of attachment it must practically pay the debt, although the foreign power may look only to the people and land of the State which made the contract. The formation of the new State so alters the nature of all the securities the creditor looked to; that the new State has a general obligation to see that he does not suffer by the change.

See Article 13 of treaty of 1839 for the separation of Belgium; and the treaty of Zurich, ceding Lombardy to Sardinia."

Wheaton's Int. L.—Edited, with notes, by Richard Henry Dana, Section 30, Note 18.

Mr. Halleck, after stating the effect of the dismemberment of a State by the loss of a portion of its territory by foreign conquest, or by the revolt and separation of a province, says:

"§27. The case is slightly different where one state is divided into two or more distinct and independent sovereignties. In that case, the obligations which had accrued to the whole, before the division are, (unless they have been the subject of a special agreement), ratably binding upon the different parts. This principle is established by the concurrent opinions of text-writers; the decisions of courts, and the practice of nations. It was incorporated into the treaty by which the modern kingdom of Belgium was established."

Halleck's International Law & Laws of War; Section 27.

Mr. John Bassett Moore thus states the doctrine:

> "In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for as Story says, 'the division of an Empire creates no forfeiture of previous vested rights of property.'"
>
> 1 Moore's Digest Int. L. p. 334, citing
> Abdy's Kent, p. 96, and
> Lawrence's Wheaton, 52 (m) 20.

A number of precedents are cited by Mr. Moore in Vol. I, Section 97, pp. 339-365, of his Digest of International Law, giving the terms upon which public debts of States have been divided and apportioned, by conventions, or treaties, between the States affected, in cases where there has been a division of territory by war, conquest; or treaty.

No sanction for the rule prescribed in the Wheeling Ordinance will be found in any of the adjustments of public debts, there recorded by the learned author.

Judge Story declared the following fundamental truth:

> "It has been asserted as a principle of the common law, that the division of an empire creates no forfeiture of previously vested rights of property.
>
> And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice."
>
> Mr. Justice Story in *Terrett and others* v. *Taylor and others*, 9 Cranch, 43; 50, citing *Kelly* v. *Harrison*, 2 Johnson, c. 29, *Jackson* v. *Lunn;* 3 Johnson, c. 109.

In *Hartman* v. *Greenhow*, 102 U. S. 672-677, Mr. Justice Field states the rule of international law in the following language:

> "Writers on public law speak of the principle as well established, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them. On this subject Kent says: 'If a State should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parts in common.' 1 Com., 26. And Halleck, speaking of a State divided into two or more distinct and independent sovereignties says: 'In that case, the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers; the decisions of courts, and the practice of nations.'" Interna. L., ch. 3, section 27."

And this language was again approved by Mr. Justice Field in his dissenting opinion in *Antoni* v. *Greenhow*, (in which opinion Mr. Justice Harlan concurred), 107 U. S. 769-7, where the following language is used:

> "It is a well settled doctrine of public law, that, upon a division of a State into two or more States, her debts shall be ratably apportioned among them. See authorities upon this subject in *Hartman* v. *Greenhow*, 102 U. S., 677."

The only dissent from the principles thus enunciated by this long line of authorities by any author whose opinions would carry any weight upon such a subject, which we have been able to discover, is to be found in the dogma of Mr. Hall; in his work on International Law, where that learned author says:

"§27. When a new State splits off from one already existing, it necessarily steps into the enjoyment of all rights which are conferred upon it by international law in virtue of its existence as an international person, and it becomes subject to all obligations which are imposed upon it in the same way. No question therefore presents itself with respect to the general rights and duties of a new State. What, however, is its relation to the contract obligations of the State from which it has been separated; to property belonging to and privileges enjoyed by the latter, and to property belonging in common, before the occurrence of the separation, to subjects of the original state in virtue of their status as such, when some of them after the separation become subjects of the new State?

The fact of the personality of a state is the key to the answer. With rights which have been acquired, and obligations which have been contracted, by the old State as personal rights and obligations the new State has nothing to do. The old State is not extinct, it is still there to fulfill its contract duties, and to enjoy its contract rights. The new State, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other States have contracted, they may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made; and it would be unjust to saddle it with liabilities which

it would not have accepted on its own account. What is true as between the new State and foreign powers, is true also as between it and the old State. From the moment of independence all trace of the joint life is gone. Apart from special agreement no survival of it is possible, and the two States are merely two beings possessing no other claims on one another than those which are conferred by the bare provisions of international law. And as the old State continues its life uninterruptedly, it possesses everything belonging to it as a person, which it has not expressly lost, so that property, and advantages secured to it by treaty, which are enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continue to belong to it. On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and which has therefore a local character, or which, though not within it, belongs to State institutions localized there, transfer themselves to the new State person. Conversely, of course, the old State person remains in sole enjoyment of its separate territory, and of all local rights connected with it.

* * * * * * * * * * * *

Property which becomes transferred by the fact of separation consists in domains, public buildings, museums and art collections, communal lands, charitable and other endowments connected with the State, and the like. When a portion of the lands belonging to a commune or to an endowment lies without the boundary of the new State it is only considered that a right to the value of the property is transferred. Convenience may dictate expropriation

from the property itself; and it is only then necessary to pay its full value by way of compensation."

Hall's International Law, Sec. 27.

The fallacy of the positions taken by this learned author will be manifest when we reflect, that, if the Wheeling Conventions and Legislatures had chosen to annex, and had annexed fifty or sixty other counties to the new State, so that it would have embraced more than two thirds of the population and territory and actual and potential wealth, public properties, assets and resources of the undivided Commonwealth, the new State would have taken a good title to all of those assets, properties, and resources, free and discharged from any liability whatever for any part of the antecedent public debt of the Commonwealth, if the ordinances and other public acts of the Wheeling Conventions and Legislatures had omitted to impose any obligation upon the new State to assume and pay any part of that public debt.

Such a result would shock the moral sense of mankind; and yet, it would be no more unjust and inequitable than that which would confront us here, if the views of this eminent author are correct, had the Wheeling Conventions and Legislatures failed to prescribe any stipulations, provisions, or conditions as to the apportionment of the antecedent common public debt between the two States.

APPENDIX No. 2.

TO REPLY BRIEF FOR COMPLAINANT ON MOTION FOR ORDER OF REFERENCE IN VIRGINIA V. WEST VIRGINIA.

Extracts from message of Joseph Johnson, of Harrison, Governor of Virginia, to the General Assembly of Virginia,

January 12, 1852. See Journal, House of Delegates, 1852, pp. 18-19.

"The subject of internal improvement, which for many years has engaged the anxious attention of our people, is rapidly increasing in interest and importance, and will require your most serious and careful consideration. Whether we look to the vast amount of capital already invested by the State in the enterprise, or the appropriations yet required to carry out successfully the schemes already begun, and thereby make them available for revenue and State purposes—or consider the magnitude of the objects sought to be obtained, and the importance of the results anticipated from their completion in the aid they will give in developing the mineral and agricultural resources and the manufacturing and commercial advantages of our State—all will see and be forced to acknowledge the importance of the subject, and the great and growing necessity for energetic and yet judicious action on your part in relation to it. Indeed the works of internal improvement already commenced and in course of construction, and upon which large sums of both public and private means have been expended, are so intimately connected with all the leading interests of the Commonwealth, that every year's delay in their completion will necessarily postpone, at a common loss to the whole people, great and incalculable blessings, and for an equal period of time defer to the State treasury that repletion which the heavy appropriations heretofore made for internal improvement purposes so earnestly demand, and which their final completion cannot fail to effect. Many of our sister States, with less capacity for such enterprises, and possessing natural resources and advantages far inferior to our own,

have, under circumstances of great embarrassment, executed works of internal improvement which would do honor to the enterprise of independent nations. Nor have they been disappointed in the individual or State benefit which their works were expected to impart. The citizens of those States feel the superiority of this improved condition of their country, and duly appreciate the increased comforts derived from it.

"If our generous and noble old Commonwealth has been tardy in the execution of those improvements most clearly indicated by the geological structure of the country, and in a proper development of her great physical resources, it is gratifying to consider, that profiting by the example of others, she may gain much of the loss in time, by wise, prompt and energetic measures hereafter."

Then, after recommending the completion of the James River & Kanawha Canal to Clifton Forge, Governor Johnson says:

"From this point I most earnestly recommend the construction of a railroad, on State account, to some point on the Ohio river deemed most eligible upon a full reconnoissance of the several routes heretofore contemplated, having in view the valuable trade of that river and ultimately a railroad connection with the cities of Cincinnati and Louisville. In connection with this line, I recommend that every proper aid should be given for the speedy completion of the central railroad from Richmond to the point proposed at the present terminus of the canal, and that from Alexandria to Gordonsville. The railroad from the canal to Loup creek shoals would not exceed 150 miles, (to which point steamboats are now accessible), and from which to Guayandotte, should that point be se-

lected as the terminus, it would be about 82 miles, making 232 miles of railroad. The water line by the Kanawha would be about 80, and strike the Ohio 40 miles above Guyandotte—thus giving the section of road between Loup creek shoals and Clifton Forge the double importance of being connected at both ends with water and railroad lines. The best energy of the State should therefore be turned to the speedy completion of this division of the work. There is little doubt that the Alexandria and Orange railroad and the Blue Ridge tunnel may be completed, and the Central railroad and the canal be carried to Clifton Forge by the time the railroad from the latter place to the Ohio river can be finished."

Journal House of Delegates, 1852, p. 21.

APPENDIX NO. 3.

TO REPLY BRIEF FOR COMPLAINANT ON MOTION FOR ORDER OF REFERENCE IN VIRGINIA V. WEST VIRGINIA.

House Joint Resolution No. 10, Concerning the Virginia Debt.

(Adopted February 7th, 1895).

Resolved by the Legislature of West Virginia:

That this Legislature hereby declines to enter into any negotiation with the debt commissioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution.

HOUSE JOINT RESOLUTION NO. 3.

(Adopted January 21, 1897.)

A resolution relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that West Virginia does not owe one cent of the so called "Virginia debt," and that this Legislature is opposed to any negotiations on that subject.

(H. J. R. No. 6.)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1899.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this Legislature declines and refuses to take any action in regard to what is known as the Virginia debt, or Virginia deferred certificates, either by considering any propositions of adjustment or settlement, so called, or by authorizing the appointment of any committee or committees having for their purposes the consideration of the same; and that it is the sense of this Legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt or certificates.

(S. J. R. No. 2.)

JOINT RESOLUTION NO. 21.

(Adopted January 16, 1901.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this Legislature declines and refuses to take any action in regard to what is known as the Virginia Debt, or Virginia Deferred Certificates, either by considering any proposition of adjustment for settlement so called, or by authorizing the appointment of any committee, or committees, having for their purpose the consideration of the same.

And, That it is the sense of the Legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt, or certificates.

(H. J. R. No. 3.)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1903.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this Legislature is opposed to any negotiations whatsoever on that subject. And, *further*, that this Legislature declines, and most emphatically refuses, to take any action in re-

gard to what is known as the Old Virginia debt, or Virginia deferred certificates, either by the consideration of a proposition of adjustment for settlement, or by authorizing the appointment of any committee or committees having for their object or purpose the consideration of same; and that it is the sense of this Legislature that the State of West Virginia is in no way or manner obligated, either morally or legally, for the payment of any portion of the said debt or certificates. Nor do we owe any other State or Territory in this Union.

(H. J. R. No. 7.)

JOINT RESOLUTION NO. 3.

(Adopted January 20, 1905.)

Relating to the Virginia debt.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this Legislature is opposed to any negotiations whatsoever on that subject.

APPENDIX NO. 4.

TO REPLY BRIEF FOR COMPLAINANT ON MOTION FOR ORDER OF REFERENCE IN VIRGINIA V. WEST VIRGINIA.

"Chap. 78.—An Act giving consent to the admission of

certain counties into the new State of West Virginia, upon certain conditions. Passed February 4, 1863.

"1. Be it enacted by the General Assembly of Virginia, That at the general election on the fourth Thursday of May, one thousand, eight hundred and sixty-three, it shall be lawful for the voters of the district composed of the counties of Tazewell, Bland, Giles and Craig, to declare by their votes whether said counties shall be annexed to and become a part of the new State of West Virginia; also, at the same time, the district composed of the counties of Buchanan, Wise, Russell, Scott and Lee, to declare by their votes whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Alleghany, Bath and Highland, to declare by their votes, whether the counties of such last named districts shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Frederick and Jefferson, or either of them, to declare by their votes, whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Clarke, Loudoun, Fairfax, Alexandria and Prince William, to declare by their votes, whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Shenandoah, Warren, Page and Rockingham, to declare by their votes, whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; and for that purpose there shall be a poll opened at each place of voting in each of said

districts, headed 'For Annexation,' and 'Against Annexation.' And the consent of this general assembly is hereby given for the annexation to the said State of West Virginia of such of said districts or either of them, as a majority of the votes so polled in each district may determine: provided, that the Legislature of the State of West Virginia shall also consent and agree to the said annexation, after which all jurisdiction of the State of Virginia over the districts so annexed shall cease.

2. It shall be the duty of the governor of the Commonwealth to ascertain and certify the result as other elections are certified.

3. In the event the state of the country will not permit, or from any cause, said election for annexation cannot be fairly held on the day aforesaid, it shall be the duty of the governor of this Commonwealth, as soon as such election can be safely and fairly held and a full and free expression of the opinion of the people had thereon, to issue his proclamation ordering such election for the purpose aforesaid, and certify the result as aforesaid.

4. This act shall be in force from its passage."

Act of the General Assembly of Virginia, approved February 4, 1863, Acts of 1863, pp. 65-66.

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CLERK.

Supreme Court of the United States

OCTOBER TERM, 1907.

Original, No. 2

VIRGINIA

vs.

WEST VIRGINIA.

REPORT OF COMMISSION—JOHN MARSHALL, CHAIRMAN. FILED AS AN EXHIBIT FOR THE COMPLAINANT.

Supreme Court of the United States

OCTOBER TERM, 1907.

Original, No. 4.

VIRGINIA

vs.

WEST VIRGINIA.

REPORT OF COMMISSION—JOHN MARSHALL, CHAIRMAN. FILED AS AN EXHIBIT FOR THE COMPLAINANT.

The fact that Virginia in 1811-12 called upon Chief Justice Marshall and others of her leading citizens to devote some weeks or months of their time to a reconnaissance of the region lying between the Blue Ridge Mountains and the Ohio, for the purpose of learning the most desirable line of communication between the waters of the Eastern Seaboard and the Western waters, and that the Great Chief Justice and the eminent men who served with him on that Commission responded to that call and devoted themselves to the arduous service which its acceptance involved, is evidence of the profound interest which in the early part of the last century the people of Virginia and her leading citizens took in that subject, and the importance which they attached to it.

The report of this historic Commission is therefore re-

printed and filed as an exhibit for the complainant in this cause.

Col. Claudius Crozet, an eminent civil engineer, who, after having served as an engineer under Napoleon, and afterwards as Professor of Mathematics or Engineering in the U. S. Military Academy at West Point, was for a number of years State Engineer of Virginia, and some of the most important of her works of internal improvement were begun under his direction.

In one of his reports he refers to the service rendered by this Commission in the following language:

"The first notice of the connection of the eastern and western waters is found in a report, made at the close of 1812, by the commissioners appointed by an act of the preceding session, 'for the purpose of viewing certain rivers within this Commonwealth.' The commissioners, John Marshall, James Breckenridge, William Lewis, James M'Dowell, William Caruthers, Andrew Alexander, examined the James river, from Lynchburg up, crossed the mountains, and descended with much difficulty, and indeed personal danger, the hitherto unexplored New river. They went through this arduous task with a zeal and perseverance worthy of such men.

"A plain sluice improvement of the James and Jackson's river, up to Dunlap's creek; thence a turnpike road, across the Alleghany mountain, which has been made since, and finally a sluice navigation of the Greenbriar, New, and Kanawha rivers were, at that early day, all they thought proper to recommend.

"A remarkable, and in our day, curious passage, occurs in their report. 'Your commissioners submit with diffidence the following propositions: First, that boats impelled by steam may

be employed successfully on New River * * *. But they beg leave to say, that the currents of the Hudson, of the Mohawk, and of the Mississippi, are very strong; and that a practice so entirely novel as the use of steam in navigation, will probably receive great improvement, and the power itself be so diversified as to be applied in new and different situations, &c.' These remarks, at the very dawn of steam navigation, show, on their part, much sagacity and forethought."

See Report of Colonel Claudius Crozet, late State Engineer, to the General Assembly of Virginia, 1848.

WILLIAM A. ANDERSON,
Counsel for Virginia.

March, 1908.

Besides the Great Chief Justice, the gentlemen who served upon this Commission were James Breckenridge, distinguished as a soldier, and statesman, and esteemed by contemporaries as the equal in ability, though not in oratory, of his brother, John Breckenridge, of Kentucky; William Lewis, a patriotic citizen of the highest character, a near relative of Col. Charles, and General Andrew Lewis, of Point Pleasant fame, and a worthy scion of such illustrious lineage; James M'Dowell, one of the gifted men of his generation, who afterwards rendered eminent service as a member of Congress, and as Governor of the Commonwealth; William Caruthers, a leading citizen of the Valley of Virginia, and a farmer and business man of very high character and standing; and Andrew Alexander, surveyor, engineer, representative citizen, a man of skill in his profession, and remarkable for his public spirit.

REPORT

OF THE

COMMISSIONERS

APPOINTED TO VIEW CERTAIN RIVERS

WITHIN THE

COMMONWEALTH OF VIRGINIA,

CONFORMABLE TO AN ACT OF SAID COMMONWEALTH, PASSED THE FOURTEENTH DAY OF FEBRUARY, 1814.

PRINTED ACCORDING TO A JOINT RESOLUTION OF BOTH HOUSES OF THE GENERAL ASSEMBLY,

AND

ACCOMPANIED BY A MAP,

EXECUTED UNDER THE DIRECTION OF THE EXECUTIVE.

IN CONFORMITY WITH THAT RESOLUTION..

PRINTED....1816.

STATE OF VIRGINIA.

INLAND NAVIGATION AND IMPROVEMENTS.

PREAMBLE AND RESOLUTION,

For re-printing the Report of the Commissioners on the Navigation of the Great Kanhawa, &c.

[AGREED TO BY BOTH HOUSES OF ASSEMBLY, FEBRUARY 14, 1814.]

WHEREAS, it would greatly promote the welfare of this Commonwealth, and the prosperity of our sister States, to form a more intimate connexion between the Eastern and Western Waters of the United States; and, with a view to that object, the General Assembly of Virginia, at a former session, appointed Commissioners to survey the head waters of James-River and the Great Kanhawa, with instructions to ascertain the practicability of extending their navigation to the base of the chain of mountains which divides them, and at the shortest and easiest portage across it; a trust which was accepted and fulfilled, by the Commissioners who acted therein, in a manner that entitles them to the thanks of their country: And, as the result of their labors has never been presented to the Legislature of

the Union, nor to the governments of the several States, who cannot but feel an interest in the accomplishment of an enterprise so important to the arts, manufactures, and commerce of the United States—

Resolved, therefore, That the executive of this commonwealth be, and they are hereby empowered and requested, to cause the Report of the Commissioners to be re-printed, and the Map and References accompanying it to be reduced to a convenient scale, engraved, printed, and annexed to the Report; and, reserving two hundred and fifty copies thereof for the use of the General Assembly, to forward a copy to each of the Commissioners whose names are subscribed to the Report, to each Member of the Congress of the United States, and to the Executives of the several States and Territories.

PROCEEDINGS

OF THE

COMMISSIONERS.

LETTER OF MR. MARSHALL, ONE OF THE COMMISSIONERS.

A COMMUNICATION from the Governor, enclosing a Letter from the Honorable JOHN MARSHALL, and a report from the Commissioners who executed the act of the last session, entitled "An act appointing Commissioners for the purpose of viewing certain Rivers within this Commonwealth," was laid before the house.

The said Letter and Report were read as follows:

Richmond, December 26, 1812.

SIR—I hasten to submit to your Excellency, for the purpose of being laid before the General Assembly, the Report of the Commissioners who executed the act of the last session, entitled "An act appointing Commissioners for the purpose of viewing certain Rivers within this Commonwealth."

To their distance from each other, and the consequent difficulties attending the interchange of sentiment, and the attainment of their respective signatures, is to be ascribed the delay which has taken place in the performance of this part of their duty.

The more detailed report, to which the enclosed refers, is not yet received, but it is expected in a few days, and will then be transmitted to your Excel-

lency. It was not thought advisable longer to withhold the general report, for the purpose of accompanying it with that more in detail, to which it refers.

I have the honor to be,
Sir, with great respect,
Your obedient servant,

J. MARSHALL.

His Excellency Governor BARBOUR.

INLAND NAVIGATION.

REPORT.

To the Honorable the Speaker and Members of the General Assembly, the undersigned Commissioners, named, with others, in the act entitled "An act appointing Commissioners for the purpose of viewing certain Rivers within this Commonwealth,"

RESPECTFULLY REPORT—

That, supposing the autumn to be the season which afforded the fairest prospects for giving effect to the views of the Legislature, as expressed in their act, your Commissioners agreed that a meeting should be called on the first of September, at Lynchburg. The number required by law, for the execution of the service they were directed to perform, having assembled, and the necessary preparations having been made, your Commissioners began at the Bridge at Lynchburg, to view James-river, and to take its level by sections to the mouth of Dunlop's-creek. Mr. Andrew Alexander, the surveyor of Rockbridge county, had been engaged to execute this duty under their direction. To his report, which your Commissioners believe to be accurate,

they beg leave to refer, as exhibiting, in minute detail, the information required by the law.

As an actual measurement of the whole river would have employed so much time as to defer the completion of the work, until high waters might defeat the object of the Legislature, and was rendered the less necessary by previous surveys; distances were in general conjectured. The eye, aided by a time-piece, and occasionally corrected by actual measurement, furnished information, which, though not perfectly exact, was believed not to vary much from the truth, and to be substantially sufficient. Those places which present serious obstacles were measured by the chain, and the elevation was taken throughout by a spirit level.

On that part of the river which is comprised within the charter already granted, your Commissioners presume that little, if any, information is expected from them, other than will be found in the annexed report of Mr. Alexander.

From Beall's Bridge, or Crow's Ferry, to the mouth of the Cow-Pasture, no difficulty presents itself, which may not be with certainty surmounted. The falls are no where formidable; there are long stretches of smooth water, and the shallows may be so deepened as to afford water for boats bringing down from six to eight tons, and carrying up from four to six tons, if not throughout the year, through all but a very inconsiderable portion of it. Your Commissioners give the opinion, unanimously, and with great confidence, that the navigation from Crow's Ferry to the mouth of the Cow-Pasture, may, with improvements by no means expensive, be ren-

dered as certain, as useful, and as permanent, as the navigation from the same place to Lynchburg; and that it may be used at all times when the navigation to Lynchburg can be used, with boats carrying an equal burthen—indeed, that it may be rendered more safe and less laborious, than that from the mouth of the North Fork to Lynchburg now is.

From the mouth of the Cow-Pasture to the mouth of Dunlop's-creek, the difficulties become more considerable, and their removal will require greater expenditures of money. The mass of water diminishes, and the elevation increases.—The shoals become longer and shallower, and the intervals of smooth water shorter. Yet, this rugged navigation, though totally unimproved, is now used during high water. Boats, laden with the produce of the country, pass every year from the mouth of Dunlop's-creek to Richmond. It is, therefore, proved to be, even at this time, practicable for some portion of the year. This portion varies with the seasons. Most commonly, it commences in November, and terminates late in May, or early in June.

That, by the removal of rocks, now lying promiscuously and irregularly through the bed of the river, which it will be necessary in only a few instances to blow, and by the judicious application of labor, to the collection of water in narrower spaces than it now covers, this navigation may be rendered much more secure and beneficial, and the time during which it can be used may be considerably extended, will not admit of doubt.—Whether this portion of the river may be rendered at all times boatable,

depends on the depth of water to be collected in particular channels by such means as are applicable to the object.

Some of your Commissioners have been personally engaged in opening the navigation of the North Fork of James-river, through Rockbridge. They are decidedly of opinion, that the river denominated "Jackson's," contains as far as Dunlops-creek, more water and less formidable obstructions than were found in the North Fork. Yet the North Fork, though its improvement is far from being complete, is now actually used to great advantage, and is not much inferior to the river below.—Some experienced and judicious boatmen, who were employed on the expedition, who are well acquainted with the river and its navigation, unite in the declaration, that, if the means be taken which ought to be employed, that part of James-river which is between the Cow-Pasture and Dunlop's-creek, may be used by any boats which will be capable of continuing their voyage to Lynchburg.

Your Commissioners concur in this opinion; and they take occasion now to remark, that should it be deemed advisable still to adhere to the system of improvement heretofore used in the upper part of the river, the difficulties of this navigation would, they think, be much diminished by several facilities which might be given to it. They would particularly suggest chains, with buoys fastened in rocks or otherwise, or walls on which men may walk, of which boatmen might avail themselves to lessen the labor of ascending places of peculiar difficulty; and thus either to increase the load which may be carried up the river, or to diminish the number of persons necessary for carrying up a given load. They will

also mention a fact deemed favorable to the object contemplated by the Legislature. It is this: although the cold may be more intense in the bosom of the mountains than below, this part of the river freezes over.

It will perhaps save the honorable the members of the Legislature some calculation, to observe, that the distance from Lynchburg to the commencement of the Blue Ridge is stated, in the report of Mr. Alexander, to be twenty-five miles one-fourth and thirty poles; the elevation to be one hundred and eleven feet eight inches; shewing an average elevation of four and an half feet to the mile.—The distance through the mountain, that is from Racoon Island to the mouth of the North Fork, is eight miles one-fourth and forty-nine poles, and the elevation one hundred and one feet six inches, giving an average elevation of upwards of twelve feet to the mile. The distance from the mouth of the North Fork to Crow's Ferry, or Beall's Bridge, the highest point to which navigation is to be carried by the James-River Company, is stated at twenty-six miles and thirty-eight poles, and the elevation is one hundred and thirty-one feet four inches; making the average elevation five feet to a mile.

The distance from Beall's Bridge, or Crow's Ferry, to the mouth of the Cow-Pasture, is stated at thirty-six miles fifty-nine poles, and the elevation is one hundred and ninety feet three inches, making the average elevation five and an half feet nearly to a mile. The distance from the mouth of the Cow-Pasture to the mouth of Dunlop's-creek, is stated at twenty-three miles three-fourths and twenty poles, and the elevation is two hundred and twenty-eight feet three inches, making the average elevation nine and an half feet to the mile.

Having reached Dunlop's-creek, your Commissioners proceeded to view and mark out what appeared to them to be the best and most direct way for a turnpike road from the mouth of that creek to the most convenient navigable point on Greenbrier river.

With some inconsiderable deviations, which will appear in the report of Mr. Alexander, already referred to, and some others which will be suggested, the road now leading from the mouth of Dunlop's-creek, by Bowyer's Sulphur Spring, to Anderson's Ford, over Greenbrier, at the mouth of Howard's-creek, is believed to be the most eligible which can be made. To that part of the road which passes from the mouth of Dunlop's-creek to the old Iron Works, a distance of about five miles, there are considerable objections, which your Commissioners are inclined to believe may be diminished. The road crosses the creek eight times, and the ground, during the winter and spring would, if much used and not well covered with stone or gravel, be much cut and be very deep. The creek too is frequently so high as not to be fordable.

Should it be found practicable, which your Commissioners believe to be the fact, to render Dunlop's-creek navigable up to its falls, some distance below the old Iron Works, these inconveniences would be in a great measure removed.

Should it be deemed unadvisable to carry navigation up Dunlop's-creek, a direction, as is understood from some of the inhabitants of that neighborhood, may be given to the road, so as to avoid five crossings of the creek, and at the same time shorten the distance. No attempt to view this way was made, because guides could not readily be procured, and your

Commissioners feared that, by devoting too much time to a minor object, on which complete information is attainable with ease and certainty through various channels, they might hazard the failure of others which were believed to be of much importance.

The road from the Sulphur Spring to Greenbrier crosses Howard's-creek, which is often not fordable, six times, and is in a few places attended with some difficulty. A small improvement may be made in it, and the steepest part avoided, by returning it, near the river, to the ground over which it formerly passed, and from which it has been lately taken.

The road over the mountain has been attentively viewed, and the deviations recommended, from that now in use, carefully and plainly marked. Your Commissioners feel much satisfaction in stating, that the elevation of this part of the road may, in the most unfavorable places, be reduced to an angle of five degrees with the horison. By occasionally removing the earth, for small distances, this angle may be still further diminished. It is believed to be susceptible of improvement on as easy terms as any other road, since the materials for a turnpike are every where convenient, and not more levelling will be necessary than must be expected in passing through a mountainous country.

Your commissioners proceeded down the Greenbrier river in the boat in which they ascended the James. The season had been remarkably dry, and the water was declared by the inhabitants to be as low as at any period within their recollection. It frequently spreads over a wide bed covered with large stone, and is, in its present unimproved state, and at the season when it was viewed, so very shal-

low for the greater part of its course, as not to swim an empty boat. The labor of removing stone, and of dragging the boat over those which could not be removed without implements provided for the purpose, was so great, that your Commissioners at one time were enabled to advance only three miles in two days, even with the assistance of a horse and of many additional laborers. In part of the river the shoals are frequent and long, and the falls, as the report of Mr. Alexander will shew, considerable. At the great falls, which is the most important of them, the descent is twelve feet in forty-eight poles. There is no perpendicular fall at this place, but one continued rapid, with large rocks, irregularly interspersed through the bed of the river. Near the mouth of the river there is a flat rock, which continues for about two hundred and forty poles, with many irregular apertures or fissures through which the water passes. Although, in the usual state of the river, this rock is covered with water of sufficient depth for navigation; yet, such was the drought of the last autumn, it was necessary to drag the boat over its whole extent.

These difficulties present obstacles to navigation during a season when the waters are remarkably low, which can be surmounted only at a considerable expense.

But, from the best information your Commissioners can obtain, and they believe it to be correct, the Greenbrier is seldom so low at any season as it was during the last autumn; and it seldom if ever fails, for eight or nine months in the year, to be at least two feet higher than when viewed by your Commissioners; a depth of water unquestionably sufficient for the purpose of navigation. The testi-

mony given by the inhabitants to this fact, was corroborated by appearances on the river. The indications of a recent considerable diminution of water were not to be mistaken.

On an attentive consideration of the obstacles which were found by your Commissioners to be great, while the river remains in the state in which they viewed it, they are unanimously and decidely of opinion, that its navigation may be rendered as safe, as certain, and as easy as that of the James, at all times, except when the water is unusually low. The rocks are in general loose, and may be removed without extraordinary difficulty, so as to afford a tolerably smooth passage to boats; and, by collecting the water into narrow channels, a sufficient depth may be obtained, with the exception of a short period in a very dry year, to swim any boat which can be brought at the same time down James-river. But so scanty is the supply of water in a time of uncommon drought, that doubts are entertained whether there may not be a short season of the year during which, unless a considerable expense be incurred, the navigation must be suspended. Though aided by men and horses, ten days of unremitting labor were consumed in passing from the mouth of Howard's-creek to the mouth of Greenbrier river, a distance not much exceeding forty-eight miles. In the month of June, the same voyage, if not retarded by measuring the river, might have been performed in a single day. Some of your Commissioners, however, are of opinion, that the Greenbrier may, without great additional expense, be rendered at all times passable for boats carrying half a load.

In addition to the shallowness of the water, (an inconvenience which is common to all rivers as you approach their sources, and which disappears for

eight or nine months in the year) and to the rocks which have been mentioned, the obstructions to the navigation of the Greenbrier consists in its falls, and in the general rapidity of its current.

The great falls alone are of sufficient magnitude to merit particular attention. These unquestionably admit of being rendered navigable, either by opening a sluice judiciously through them, or by locks. The latter would be most expensive, but would leave the navigation less laborious.

The rapidity of the current may be estimated by observing that the descent in forty-eight miles and eighty-four poles, is three hundred and sixty-two feet ten inches, between seven and eight feet to the mile.

This current will present no difficulty to a boat descending the river. To one ascending it, the labor will be considerable, but not so considerable as in some parts of James-river.

The night of the 28th of September, was passed among the islands in the mouth of Greenbrier; and on the morning of the 29th, your Commissioners entered New-river.

The New-river, or that part of the Great Kanhawa which is above the mouth of Gauley, having to search its intricate way, and force a passage through a long chain of lofty and rugged mountains, whose feet it washes, exhibits an almost continued succession of shoals and falls, from which the navigator is sometimes, though rarely, relieved by a fine sheet of deep placid water.

The difficulties encountered in descending this river were of a character essentially different from those which were experienced in the Greenbrier. Uncommon as had been the drought, the supply of

water was abundant. The boat sometimes, though rarely, rubbed upon a shoal; but in every such case it was apparent that a sufficient passage might be opened without much labor or expense. The velocity of the current and the enormous rocks which often interrupt it, the number and magnitude of the rapids and falls, the steepness, cragginess and abruptness of the banks, constitute the great impediments which at present exist to navigation between the mouth of the Greenbrier and the Great Falls of Kanhawa.

The distance from the mouth of Greenbrier to Bowyer's Ferry, is forty miles one quarter and forty-six poles, and the descent is four hundred and sixty-six feet seven inches; that is, eleven feet six inches in each mile. In general, there is much sameness in the appearance of this part of the river. Long rapids, frequently terminated by a fall of from five to ten feet, in a distance of ten, twenty, thirty, and sometimes a greater number of poles; an intervening space, sometimes more, sometimes less considerable, of swift or smooth water; rocks, sometimes above the surface, sometimes near it, so as to require great caution to save a boat from dashing on them; a copious stream, with a current commonly impetuous, constitute its leading characteristics.

Falls too great to come within this general description, will be particularly noticed.

Brook's Falls are about four miles and one-fourth below the mouth of Greenbrier. The water descends thirteen feet seven inches in fifty poles. In its most rapid part the descent is five feet ten inches in fourteen poles. The boat was navigated through this place.

A much more formidable obstruction is the falls

at Richmond's Mill. These are designated in the neighborhood by the name of the "Great Falls of New-river," but are generally called at a distance, "Lick-Creek Falls."

At this place the water may with propriety be said to fall perpendicularly twenty-three feet. For this distance, the sheet which dashes over the summit is intercepted only by huge fragments of broken rock, which, having been successively disjointed from the brink of the precipice, have fallen into the foaming basin below, where, piled on each other, they form one or two benches that break the cataract. A small distance lower down is another fall of three or four feet.

Here, for the first time, the boat was taken out of the water and let down by skids.

The ground along which a canal may be carried around these falls, pursuing the course of Richmond's mill-race, was measured, and the elevation taken. The descent was found to be twenty-two feet nine inches, in one hundred and eighty-one poles.

This estimate excludes a part of the falls, between five and six feet of which are just above the head of Richmond's mill-race.

The bottom of the river for some distance above these falls, is a hard rock, often appearing above the surface, and much covered with moveable stones, some of which are very large. The bottom of the mill-race appears to be of the same description.

From Bowyer's Ferry to the Falls of the Great Kanhawa, was estimated at nineteen miles and fifty-eight poles, in which distance the river falls three hundred and thirty-one feet; that is, seventeen feet to a mile. The honorable the legislature will perceive, that below the ferry the descent, in the same

distance, is greater than above. For a part of this space, the scene is awful and discouraging. The vast volume of water which rolls down New-river, and which, far above the ferry, often spreads, without becoming shallow, over a bed three or four hundred yards wide; is seldom more than one hundred or one hundred and fifty yards wide. In some places, for a mile or more in continuation, it is compressed by the mountains on each side, into a channel of from twenty to sixty yards wide; and even these narrow limits are still more narrowed by enormous rocks which lie promiscuously in the bed of the river, through which it is often difficult to find a passage wide enough for the admission of a boat. In some places the bank is formed of rugged and perpendicular cliffs of entire rock, which appear to be twenty,thirty, and forty feet high; in others, enormous, but unconnected, rocks dip into the water.

There are unequivocal indications of the river's having risen, in these narrows, from thirty to forty feet perpendicularly.

Immediately above the mouth of Gauley, the river opens and presents a beautiful sheet of deep smooth water, which is succeeded by the rocks over which it dashes, and forms the Great Falls of Kanhawa. The height of these falls is twenty feet four inches. With its name, the river looses its wild and savage aspect. It is no longer confined by rugged cliff, by mountains barely separated from each other, nor interrupted by enormous masses of rocks which are scarcely to be avoided.

Within a short distance above the falls, the current is not unmanageably swift, nor the rocks over which it passes uneven. Below, quite to the rocks which have fallen from the brink over which the

cataract rushes, is a deep smooth and beautiful basin. The river is so wide as to rise, in the greatest freshes, only six or seven feet. The falls themselves constitute the impediment, and the only impediment at this place.

Your Commissioners have deemed it proper to state in their full strength, the difficulties which are to be surmounted in opening the intercourse between this part of the state of Virginia and the western country; and to put the legislature, as far as is possible, in possession of the testimony on which their opinion is formed, as well as of their opinion. If, misguided by their conviction of the importance of the object, they are too sanguine in their hopes of its accomplishment, the facts now communicated will enable the General Assembly to correct the mistaken conclusions which have been drawn, and to determine on the course which will best promote the interests of the public.

The practicability of rendering the Greenbrier navigable has already been stated. The system which may be found best adapted for the improvement of James-river, will be equally applicable to the Greenbrier, and will be equally successful.—The one river and the other will be rendered more or less valuable as more or less labor and skill may be employed on them; but there can be no mistake in saying that, without incurring an expense which any would pronounce extravagant they are both capable of being brought into extensive use. Not only in descending, but in ascending also, these rivers may be navigated to great advantage.

With respect to New-river, a judgment cannot be formed quite so decisively, nor pronounced quite so

confidently. The difficulties are great, and deserve to be seriously considered.

The boat which conveyed your Commissioners, passed from the mouth of Greenbrier, to the place where their expedition terminated, without being taken out of the water, except at the Great Falls of New-river, and at the Great Falls of the Kanhawa. It was navigated in the usual way through all the other difficult places which abound in New-river, except two—both below Bowyer's Ferry. Through these it was conducted by ropes.

The boat was not laden, nor was it empty. In addition to the number of hands usually employed in navigation, it carried between two and three thousand weight. The greater part of this burthen was taken out in the most difficult places; but in many of considerable magnitude, it remained in the boat. Where the vessel was guided by ropes, the necessity of resorting to this expedient was occasioned solely by the intervention of rocks, which can be removed.

It is also worthy of notice, that this voyage was performed by boatmen, who, having never before seen the river, were reduced to the necessity of selecting their way at the moment, without the aid of previous information.

The only impediments to the descent of the boat, except at the two great falls already mentioned, were rocks lying so near the surface of the water as to strike the bottom while shooting over them. At the usual height of the river, these rocks would be entirely covered, and all danger from them be removed: but others would be placed in a situation to expose a boat to equal hazard. It is therefore necessary, even for the descending navigation, to open a plain and broad sluice through all the rapids and falls, so as to relieve boats navigating the river from all dan-

ger of being dashed against the rocks. This may be effected by removing some and blowing others.—This sluice may be so conducted as to graduate the falls where they are most sudden, and thereby, in some degree, to diminish the impetuosity of the current.

Brook's Falls, the Great Falls of New-river, and the Great Falls of Kanhawa, will probably require and admit of a different course.

The first of these, which is the least formidable of the three, will present three alternatives to the election of those who may be engaged in improving the navigation.

First—One or more locks, which may unquestionably be constructed at this place.

Second—A canal, which is already almost formed, on the north side of the river. Its completion would require that it be opened for a short distance, both where it would receive the water at the head of the falls and where it would empty itself below them.

To the eligibility of this canal, there can be but one objection. There may be impracticable rock, now hidden by the earth, so near the surface as to render this plan unadvisable.

Third—To open a sluice in the river, along its northern bank, and graduate the fall as far as may be compatible with that system of operation.

The Great Falls of New-river must be turned, by using a canal to be cut on the southern side, pursing nearly the tract of Richmond's mill-race. Should locks be employed, it will most probably be found advisable to place them in this canal. Should locks be dispensed with, there will be no difficulty in descending through this channel; but the toil of ascending, must, at this place, be considerable.

At the Great Falls of Kanhawa, there is, near

Morris's mill, a very eligible place for locks. If a canal be preferred, there is every reason to believe that the ground will admit of one, which may be so extended, and the fall thereby so graduated, as to afford a safe passage to loaded boats.

These observations are formed on the state of the river when viewed by your Commissioners.—It will readily occur, that they cannot judge with certainty of the changes which may be brought about by a great rise of water.

It would seem most probable, that by such rise the falls would be diminished, because the water at their feet would pass off less rapidly than at their head. But the apprehension cannot be entirely discarded, that in the narrows, which have been mentioned, the torrent would, in a flood, be too impetuous to be trusted. It is probable, that a moderate elevation of the water would rather facilitate the passage of the boats; at least of those descending the river; but that great floods would suspend the navigation.

Having stated their view of this subject, your Commissioners will only add their opinion, that the New-river may be relied on with certainty, for the transportation of articles from east to west.

On the practicability of using this channel of conveyance for the transportation of articles from the western country, towards the rivers which empty into the Atlantic, at least so much of it as lies between Bowyer's Ferry and the Great Falls of Kanhawa, they must speak with less confidence. The great difficulty consists in the velocity of the current. For several miles, between Bowyer's Ferry and the Falls, it is believed that a canal would be impracticable. The river is susceptible of no other improvement than may be made in its channel, or on

its banks. The current is often too rapid to be stemmed by a boat impelled by oars; and the water too deep to admit the use of poles. If a channel, sufficient for the safe passage of vessels, be opened, still some other means than oars or poles must be devised for impelling them up the stream.

Your Commissioners submit with diffidence the following proposition:

First—That boats impelled by steam may be employed successfully on New-river.

With the capacities of this powerful agent they are too little acquainted to speak with confidence of the use which may be made of it in the waters of Virginia. Elsewhere, it has certainly been applied with great advantage to the purposes of navigation. Neither have they that intimate knowledge of the velocity of the currents, against which vessels have been propelled by it, to compare them with that of New-river, and to hazard any decided opinion on the comparison.—But they beg leave to say, that the currents of the Hudson, of the Mohawk, and of the Mississippi, are very strong; and that a practice so entirely novel as the use of steam in navigation, will probably receive great improvement, and the power itself be so diversified in its modifications, as to be applied in new and different situations, as their exigencies may require. It is believed, that a sufficient depth of water is certainly obtainable, but whether sufficient employment may be found, to justify the use of a vessel which must, in any state of things, be constructed at considerable expense, is a question your Commissioners cannot attempt to solve.

Second—Should it be found impracticable to apply steam with advantage to the navigation of New-river, it is respectfully suggested, that between the

Great Falls of Kanhawa and Bowyer's Ferry, resort may be had to horse labor.

To give this facility to the navigation, it will be necessary to construct a horse-way along the bank of the river at different heights, or at the most common height of the water. The objection that such way cannot be used at all times, will lose much of its force, when it shall be recollected that the navigation up the river will admit of being suspended for considerable intervals, with less injury to those who use it, than that which conveys to the western country articles imported for general consumption. The construction of this way, however, will require the blowing of a great quantity of rock, and will, consequently, be expensive.

Third—Should neither of these expedients be deemed eligible, it is respectfully suggested, that boats may be forced up the current, where it is too rapid for oars and too deep for poles, by the aid of chains fastened in the rocks on the bank.

Whatever doubts may be entertained respecting the navigation for boats ascending the river between the Great Falls of Kanhawa and Bowyer's Ferry; your Commissioners are entirely persuaded of the practicability of using it advantageously between the ferry and the mouth of Greenbrier.

In obedience to the law under which they have acted, your Commissioners will now proceed to state their ideas of the sums of money which will probably be necessary to open the river and make the road they have viewed.

No part of their duty has been performed with less confidence than this.

It will readily occur to the legislature, that no estimate of expense of executing so great a work as that which is to afford to the western parts of

Virginia the means of conveying the produce of their lands to market, and probably to connect Virginia commercially with her sister states in the west, can have just pretensions to exactness.—Were the system of improvement, and the extent to which that system is to be carried, accurately defined; any calculations which could now be made, even by professional men, of the sum necessary for its execution, might be found to vary widely from that which would be actually expended. Still less precision can be looked for in the calculations of your Commissioners.

But it must be apparent that the expense of improvement will essentially depend on the object for which the improvement shall be made.

If the views of the legislature shall be limited to the conveyance of articles, the growth of the upper country, down James-river, the cheapness of that conveyance will certainly depend much on the degree of perfection to which the improvement may be carried; but the river, being the only channel of conveyance, will, if merely practicable, be used to some extent.

If the views of the legislature shall extend to a free commercial intercourse with the western states, or any of them, the channel selected for that intercourse will come into competition with others which now exist or may be opened, and must recommend itself to a preference by the advantages it offers. With a view to the latter object, no improvement ought to be undertaken but with a determination to make it complete and effectual.

The estimates of expense were more particularly made by Mr. Caruthers, who has been personally engaged in opening the North Fork through Rock-

bridge. This gentleman made his calculations on the plan which has been adopted by the James-River Company, with such improvements as would better adapt that plan to steam navigation. According to his estimate, one hundred and ninety thousand dollars will be sufficient to accomplish the work from Beall's Bridge, or Crow's Ferry, to the Falls of the Great Kanhawa, including the road.—This estimate is formed on a comparison of the impediments to be removed, with those he had himself encountered in opening the North Fork of James-river. Some others of your Commissioners, who have too little knowledge of the labor necessary for the accomplishment of objects of this description, to confide themselves, in their own judgment, much less to recommend it to the confidence of others, are so impressed with the magnitude of the difficulties they have seen, as to be unable to persuade themselves that the work can be completed for the sum at which it has been estimated. That estimate does not appear to them to be extravagant, if the descending navigation alone be contemplated. To make the ascending navigation such as will entitle it to extensive use, and give this a preference over other routes, they submit, though with much diffidence, the opinion that at least a half a million, perhaps six hundred thousand dollars, will be requisite.

From the mouth of Dunlop's-creek to the mouth of Howard's creek, is twenty-eight miles and forty-four poles. From the first mentioned place to the summit of Alleghany mountain, is sixteen miles and thirty-six poles, and the elevation is nine hundred and forty-eight feet, which makes an angle with the horison of less than three-quarters of a degree. From the summit of the mountain to the mouth

of Howard's-creek, the distance is twelve miles and eight poles, and the descent is eight hundred and thirty-eight feet seven inches, making with the horison an angle of about three-quarters of a degree. There are no peculiarities attending this route, which will render any plan the legislature may prefer for turnpiking it, more costly in its application to this road, than to others which have been constructed in various parts of the United States. It is now at least equal to, perhaps better, than any other of equal distance in the same part of the country.

In presenting to the honorable the legislature the advantages which, in the opinion of your Commissioners, will probably accrue to this state from executing the work to which their report relates, it will be necessary to divide this subject, and to consider, separately—first, those which may reasonably be expected to result from executing it in part; next, those which are to be looked for from executing it in the whole.

Should the navigation of James-river be carried up to the mouth of Dunlop's-creek, and a turnpike road be made over the Alleghany mountain, although nothing further should be done, a considerable impulse will be given to the agriculture, and a valuable effect produced on the wealth and population of a considerable tract of country. It cannot reasonably be doubted, that Bath, a part of Botetourt, and a great part of Greenbrier, Monroe, and perhaps even Giles, would find a real interest in searching for a market on James-river, for the produce of their soil, if such safe and cheap conveyance were afforded them as might be given by the improvements which have been stated.—Agriculture

would mingle more than heretofore with grazing; and industry would flourish when the reward of industry should be attainable. Those more western countries, whose distance might forbid the attempt to transport grain manufactured into flour, or distilled into spirits, to the markets on James-river, might still be encouraged to bring to those markets, salt, salted provisions, and various manufactures of hemp. An increase of population would result, not only from the check which this state of things would give to emigration, but also from its operation on the inhabitants, in other respects.

Other parts of the state would derive corresponding advantages from their intercourse with a section of the country which would have more to sell and more to purchase than at present. By the augmentation of the wealth and population of a part, not only would those belonging to that part be improved in their circumstances, but the whole would be more powerful, and the public burdens being more divided, might press less heavily on each individual.

These advantages would probably be extended by improving the navigation of the Greenbrier also.

Should New-river be rendered a safe and easy channel of communication, between the Ohio and the commercial towns on James-river, the subject will assume a more important aspect, and the advantages may be estimated on a larger scale. Not only will that part of our own state which lies on the Kanawa and on the Ohio, receive their supplies and send much of their produce to market through James-river, but an immense tract of fertile country, a great part of the states of Kentucky and Ohio, will most probably give their commerce

the same direction. All that part of the state of Kentucky which lies above Louisville, and all that part of the state of Ohio whose trade would pass through the river of that name, might reasonably be expected to maintain a large portion of their commercial intercourse with the Atlantic states, through the James or the Potowmac. Certainly in a contest for this interesting prize, the states through which those rivers run have geographical advantages, the benefit of which they can lose only by supineness in themselves, or by extraordinary exertions in others. It is far from being impossible, that even the south-western parts of Pennsylvania may look down one of these rivers for their supplies of goods manufactured in Europe.

Let the importance attached by men best acquainted with the subject to the commerce of the west attest its value. The exertions which other states appear to be making to secure it, will probably awaken the attention of Virginia to that part of it which should naturally belong to her.

There is still another aspect in which this subject deserves to be viewed.

That intimate connection which generally attends free commercial intercourse, the strong ties which are formed by mutual interest, and the interchange of good offices, bind together individuals of different counties, and are well calculated to cherish those friendly sentiments, those amicable dispositions, which at present unite Virginia to a considerable portion of the western people. At all times the cultivation of these dispositions must be desirable but, in the vicissitude of human affairs, in that mysterious future, which is in reserve, and is yet hidden from us, events may occur to render their pre-

servation too valuable to be estimated in dollars and cents.

The advantages which may result to Virginia, from opening this communication with the western country, will be shared in common with her by the states of Kentucky and Ohio.

Considering it as a medium for the introduction of foreign articles into those states, it has claims to their serious attention.

The proposition that a nation finds its true interest in multiplying its channels of importation, admitting them to be equally convenient, is believed to be incontrovertible. In addition to those arguments in support of this proposition which belong to every case, the situation of the western states suggests some which are peculiar to themselves, and which well deserve their consideration.

The whole of that extensive and fertile country, a country increasing in wealth and population with a rapidity which baffles calculation, must make its importations up the Mississippi alone, or through the Atlantic states. When we take into view the certain growth of the country, we can scarcely suppose it possible that any commercial city on the banks of that river can keep pace with that growth, and furnish a supply equal to the demand. The unfriendliness of the climate to human life, will agricultural capital still more sensible. It will tend render this disparity between the commercial and still more to retard a population of that sound mercantile character, which would render some great city on that majestic river, a safe emporium for the western world.

In times of profound peace, then, the states on the Ohio would make sacrifices of no inconsidera-

ble magnitude, by restricting their importations to a single river. But, in time of war, their whole trade might be annihilated. When it is recollected that the Mississippi empties itself into the Gulph of Florida, which is surrounded by foreign territory; that the island of Cuba and the coast of East Florida completely guard the passage from its mouth to the ocean; that the immense commerce flowing down its stream, holds forth irresistible allurements to cruizers, the opinion seems well founded, that scarcely a vessel making for that place could reach its port of destination.

But the length of the voyage up the Mississippi and Ohio, must be attended with delay so inconvenient to persons engaged in commerce, as to render a shorter route, though not less expensive, more eligible. For importation of many articles, there is much reason to believe that a decided preference would always be given to the transportation through the United States, were that transportation rendered as easy as it is capable of being made.

The export trade during peace, so far as the articles exported were designed for a foreign market, would, more probably, pass exclusively down the Mississippi. But those articles which are consumed in the United States, as manufactures of hemp, would find their way to market through interior and shorter channels.

If the direct route through the Atlantic states would, for many purposes, be more eligible than that through the Gulph of Florida, which must be often connected with a coasting voyage to or from an Atlantic port, then the multiplication of those routes, if in themselves equal, by presenting a greater choice, and by accommodating more territory, must be desirable.

But your Commissioners are sanguine in the opinion, that the communication through the rivers they have viewed, if properly made, will possess advantages over every other, which cannot fail to recommend it to a large portion of the states of Kentucky and Ohio. All that part of the western country which draws its supplies and transports its produce through the river Ohio, and which lies east of Louisville and west of the Pennsylvania line, perhaps a part of the state of Pennsylvania itself, could probably use this route more advantageously than any other; unless, indeed, that through the Potowmac, connected with Monongehela, Cheat, or Yohaghena, should come into competition with it, for the eastern part of the country just mentioned.

That it would, for the importation of articles from Europe, and from the east, (with a few exceptions) and for the exportation of those which are consumed in the United States, be preferred to the voyage through the Mississippi, unless the introduction of steam boats should essentially vary the present state of things, may safely be assumed from the fact, that a land carriage between Pittsburg and Philadelphia or Baltimore, and a carriage up or down the Ohio, are now used for the purposes described, in preference to the route by New Orleans.

The present price for the transportation of goods from Philadelphia or Baltimore to Pittsburg, is understood to be from seven to ten dollars per hundred weight.

The price of transportation from Richmond, up James-river to the mouth of Dunlop's-creek, thence across the Alleghany to Greenbrier, and down to the mouth of the Great Kanhawa, will certainly depend on the goodness of the road and the degree of perfection to which the navigation may be carried. Your

Commissioners believe that a sound national economy would dictate such improvements as would reduce the price of freight, although the labor employed in making them might be procured by an augmentation of toll, and some expenditure of public money.

Should the navigation of James-river be rendered as safe and as easy as may be reasonably expected, and the Greenbrier and New-river be improved, in such manner as the object will justify, your Commissioners believe they hazard nothing in saying, that the expense of transporting one hundred weight from Richmond to the mouth of the Great Kanhawa, will not exceed half the price of transporting the same weight from Baltimore or Philadelphia, to the same place.

The immense works meditated in New York, will certainly, if executed, give to that state great advantages in a competition for the trade of the lakes. But if other convenient and more direct channels be opened, it is not probable that the commerce of the Ohio will take the circuitous route by the lakes.

The expense of transportation from New York through the canal contemplated, can only be conjectured. The character of the rivers which would be used, is not well understood, but they must possess many advantages to give them a preference over the direct way through Virginia to the Ohio.

Your Commissioners, however, take the liberty to repeat, that the success of any attempt to obtain that share of the commerce of the west, to which this state, from her geographical situation and her rivers, would seem to be entitled, must depend entirely on the safety and cheapness of her navigation. A mode of transportation by water in itself insecure, or so

laborious as to be little less expensive than carriage by land, will never change the channels in which this trade already flows.

The advantages to accrue to the United States, from opening this new channel of intercourse between the eastern and the western states, are those which necessarily result to the whole body from whatever benefits its members, and those which must result to the United States, particularly from every measure which tends to cement more closely the union of the eastern with the western states.

In those operations, too, which the exigencies of government may often require, this central channel of communication by water may be of great value. For the want of it, in the course of the last autumn, government was reduced to the necessity of transporting arms in waggons from Richmond to the falls of the great Kanhawa. A similar necessity may often recur.

All which is respectfully submitted to the General Assembly, by

JOHN MARSHALL,
JAMES BRECKENRIDGE,
WILLIAM LEWIS,
JAMES M'DOWELL,
WILLIAM CARUTHERS,
ANDREW ALEXANDER.

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Office Supreme Court, U. S.
FILED.
MAY 18 1908
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 1 Original.

VIRGINIA, COMPLAINANT,

v.

WEST VIRGINIA, DEFENDANT.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On behalf of the Commonwealth of Virginia, the undersigned beg to nominate as suitable persons from whom a selection may be made by the court of one to be appointed "special master" to ascertain and report on the several subjects indicated in the order of the court of the day of May, 1908, the following named gentlemen, viz:

Mr. J. J. DARLINGTON, of the District of Columbia;

Mr. GEORGE WHARTON PEPPER, of the city of Philadelphia.

Apart from the qualification of personal fitness, the residence of the master is regarded as a feature entitled to great consideration. He should be in a locality easily accessible to the counsel in the cause, and especially should he be where he could have easy and frequent access to the public records of Virginia, in the city of Richmond, from which nearly all the facts on which the inquiries he will be charged with conducting are to be found.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

I cordially concur in the above nominations.

HOLMES CONRAD,
Of Counsel.

MAY 14, 1908.

FILE COPY.

Office Supreme Court, U. S.
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APR 16 1910
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 2 Original.

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

vs.

STATE OF WEST VIRGINIA.

COMPLAINANT'S EXCEPTIONS TO REPORT OF THE SPECIAL MASTER, DATED MARCH 17, 1910.

SAMUEL W. WILLIAMS,
Attorney General of Virginia.

WILLIAM A. ANDERSON,
RANDOLPH HARRISON,
JOHN B. MOON,
Of Counsel for Complainant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 3, Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

Complainant's Exceptions to Report of the Special Master, Dated March 17, 1910.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the State of Virginia, by Samuel W. Williams, Attorney General, humbly prays leave to file the annexed exceptions to the report of the Honorable Charles E. Littlefield, Special Master, in the above cause, which report was filed in this court on the 17th day of March, 1910.

And as in duty bound your petitioner will ever pray.

STATE OF VIRGINIA,
By SAMUEL W. WILLIAMS,
Attorney General

WILLIAM A. ANDERSON,
RANDOLPH HARRISON,
JOHN B. MOON,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 3, Original.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs.

STATE OF WEST VIRGINIA, *Defendant.*

Complainant's Exceptions to Report of the Special Master Dated March 17, 1910.

I. *Complainant's First Exception.*

For errors of law apparent in the record, complainant respectfully excepts to the statements contained in the master's report in regard to the literary fund, save and except so far as they show the creation, existence, and amount of such fund, and especially does complainant except to the master's conclusions that the Board of the Literary Fund (a corporation) had no right to sue and be sued and that the fund was the unconditional property of the State and subject to its control and ownership, while the said fund was under the law held and controlled by the board and the State in trust for educational purposes alone. See Master's Report, pp. 6 to 30, and acts in Appendix to Record, pp. 205-208.

II. *Complainant's Second Exception.*

Complainant respectfully excepts to the report and findings of the special master under paragraph III of the decree of reference, for not allowing to Virginia, and charging against West Virginia, "*all* expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted"; but on the contrary excluding from those charges against West Virginia, a large number of items of expenditure which were made by Virginia in that territory during that period, on the ground that, having been made through the medium of joint stock companies, they were expenditures made by those companies out of their own funds and not by the State, and were "indirect," and not "direct" expenditures (Report of Special Master, pp. 39, 62, and 85).

The items, the disallowance of which by the special master is here respectfully excepted to, are the following expenditures, all of which were made by Virginia for the construction of "works of internal improvement" and were actually made in West Virginia territory, namely:

(1) For Bridges: Expenditures made by Virginia upon bridges in West Virginia territory, built by joint stock companies owned partly by the Commonwealth—Items 57 to 65, inclusive, of Joint Exhibit C-1, p. 4, R., 375; Special Master's Report, p. 85—aggregating	$78,412.50
(2) Expenditures made by Virginia in the improvement of the navigation of West Virginia rivers by joint stock companies—Items 66 to 69, inclusive, of Joint Exhibit C-1, p. 4; R., 375; Special Master's Report, p. 85—aggregating	210,500.00

(3) Expenditures made by Virginia upon turnpikes wholly in West Virginia territory, built by joint stock companies:		
(*a*) On Charleston and Berryville turnpike, in West Virginia—Item No. 6 of Joint Exhibit C-1, p. 2; R., p. 373; Special Master's Report, pp. 64 and 84.....	$11,932.52	
(*b*) On turnpikes and roads mentioned in items 70 to 147, inclusive, of Joint Exhibit C-1, pp. 4, 5, and 6; R., 375, 376, and 377; Special Master's Report, pp. 78, 79, and 85..	803,555.83	
Total expenditures by Virginia, through joint stock companies, on turnpikes and roads in West Virginia territory.....	815,488.35	$815,488.35
Total aggregate of items, the disallowance of which is here excepted to.....		$1,104,400.85

Paragraph III of the decree, closely following the terms of the Wheeling ordinance, directs the special master to ascertain and report "*all expenditures* made by the Commonwealth of Virginia within the territory now constituting West Virginia," &c.

This required that *all* such expenditures, *however made*, should be included in this account.

The special master has, as we respectfully submit, erred in including in this account only such expenditures as were made "directly," and excluding such as were, as is alleged, made "indirectly" by the Comonwealth.

Joint Exhibit C-1 is an agreed schedule as to the figures stated therein, but not as to the classification or allotment of

the charges therein made. There is, therefore, no question of fact whatever that these expenditures were all made, and were made upon the soil of West Virginia. Nor can there be any question that the amounts of money making up these aggregates were all paid out of the treasury of the Commonwealth to joint stock companies for the express purpose of constructing the several internal improvements in West Virginia counties, which such companies were respectively distinctly formed to construct. The State received certificates of stock for the money so expended, but the expenditures, though they were made on West Virginia territory *immediately* by joint stock companies, the agencies or media selected by the State (of which West Virginia then formed an integral part) for that purpose, were none the less, in fact, made *mediately* by the State.

Whether they were *mediate* or *immediate*, "direct" or "indirect" expenditures made no difference, as neither the Wheeling ordinance nor the decree make or justify any distinction between direct and indirect expenditures; for both the decree and the ordinance require *"all* the State expenditures" to be charged.

While there is no question of fact involved in this exception, we refer the court to Joint Exhibit C-1, pp. 4, 5 and 6; R., pp. 375, 376, and 377; to the acts of the General Assembly of Virginia, Appendix, pp. 3 to 10, 12 to 19, 20 to 23, and 136 to 145; and to the Master's Report, pp. 39 to 43, and p. 83, and last three paragraphs of page 85. See also report of the finance committee of the Senate of West Virginia, filed as Exhibit 3 with defendant's answer, which confirms this view. R., 168-9.

III. *Complainant's Third Exception.*

Complainant respectfully excepts to the finding of the special master, under paragraph V of the decree, of the fair estimated value of the real and personal property in the counties of Virginia as of January 1, 1861 (Special Master's

Report, pp. 167, 168, and 173), as not being responsive to that paragraph or any other paragraph of the decree.

IV. *Complainant's Fourth Exception.*

Complainant respectfully excepts to the findings of the special master under paragraph V of the decree:

(1) For including slaves in his statement of the fair estimated value of the personal property in Virginia on the 20th of June, 1863, notwithstanding the fact that all of them had been then emancipated by the proclamation of the President which became effective January 1, 1863.

(2) For adopting the assessed value of slaves in June, 1863 ($250,851,591, or $634.89 apiece), as their fair estimated value at that time, and the assessed value of personal property other than slaves ($152,844,637.59) as its fair estimated value at that time, instead of finding the fair estimated value of all personal property then in Virginia (including slaves, which we insist should be excluded) to have been not exceeding 50 per cent of the assessed value as reported by the master. The evidence establishes the fact that there was an enormous destruction and depreciation of personal property in Virginia in June, 1863, in consequence of the violence and waste of the war then raging, and that the ratio of value which gold at that time bore to Confederate currency, the only medium of exchange in Virginia, was from 7 to 8 for 1. Special Master's Report, pp. 168, 169, 170, and Exhibit "E–1," pp. 5, 6, and 7; R., 643, 644, and 645. See also Plaintiff's Exhibit "E–2," R., p. 647, and deposition of Charles U. Williams, p. 780.

(*a*) Slaves, as above stated, should not have been included in the account at all. The President's emancipation proclamation had then become effective, and the tenure by which slaves may have been then nominally held as property was

so precarious and worthless that they constituted no basis upon which to hypothecate any State liability whatever.

(*b*) If they could have been fairly treated as property for any purpose in this litigation, then the special master's statement of their value is greatly excessive. This will be manifest from the following facts:

The master finds all of the personal property in the present State of Virginia, *including slaves*, to have been of the fair estimated value of $403,696,228.59 on the 20th of June, 1863—page 172 of his report.

He finds the fair estimated value of the personal property in Virginia, *without slaves*, on the same day to have been $152,844,637.59. *Idem.*

His estimate of the fair value of the slaves in that territory at that date was, therefore, the difference between $403,696,228.59 and $152,844,637.59, or $250,851,591. This is the amount which the slaves in the present State of Virginia are computed to have been worth in 1863 by said exhibit printed at pages 643, 644, and 645 of the record returned with the master's report, and this computation the master has adopted.

That computation is grossly inaccurate in two particulars: First, it takes the number of slaves in the Commonwealth to have then been 395,105. To do this it assumes, without any proof, that there were in June, 1863, the same number of slaves in the counties and cities occupied or dominated by the military forces of the United States that there were at the time the slaves in those counties were last assessed for taxation. The thousands of slaves in the territory so occupied or dominated were not only then free under the terms of the emancipation proclamation, but they were then actually free, and no longer worth anything as property. There is no evidence anywhere in the record that there were 395,105 slaves in Virginia on the 20th of June, 1863. That number

manifestly includes thousands of former slaves who were then practically free.

The special master places an excessive value upon this excessive number of slaves.

He counts the 395,105 slaves as then worth $250,851,591, or $634.89 apiece.

The *agreed* fair estimated value of the 490,865 slaves in Virginia on the 31st of December, 1860, was $344 apiece, or $162,537,936. Master's Report, p. 167; Stenographic Report of the Hearings before the Master, vol. 20, p. 3153.

The special master's finding is that 395,105 slaves were worth in June, 1863, $98,313,655 more than 490,865 slaves were worth in December, 1860, and that each slave in Virginia was worth in June, 1863, $290.89 more than the sum which the parties have agreed was the fair estimated average value of each in December, 1860.

There is no evidence in the record which shows or tends to show that slaves were more valuable in Virginia in June, 1863, than they were in December, 1860. All the evidence which relates to this subject tends to show that they were vastly less valuable at the latter date. See evidence of Col. John P. Branch, R., 756; of Major P. A. Wellford, R., 763, answer to Q. 35, and the evidence hereinafter referred to as to the general depreciation of all personal property in Virginia in June, 1863, and as to the taxation and assessment of such property, including slaves, at its value in Confederate currency.

(*c*) The uncontradicted testimony in the cause shows that personal property throughout Confederate Virginia had depreciated fifty per cent (50%) *as a minimum* in June, 1863, as compared with the period in 1861 and 1860 before the war. See depositions of R. W. Hunter, W. W. Scott, John P. Branch, Philip A. Wellford, William G. Taylor, S. H. Hawes, Charles U. Williams, and W. Gordon McCabe (R., 739 to 786).

These witnesses prove that there was an enormous de-

terioration, destruction and depreciation in the value of personal property in Virginia between those dates. Major P. A. Wellford says (R., pp. 763, 764, and 765):

> "Q. 37. Taking all the movable personal property, live stock, farming utensils, vehicles of every kind, household and kitchen furniture, the stores of tobacco and corn, what would you say, as a minimum, was the depreciated (depreciation) of all personal property in Virginia in June, 1863, as compared with January, 1861.
>
> "A. Leaving out cotton and tobacco, I would say that it was nearly 75 per cent. Carriages and wagons were all worn out. All farming utensils were almost worn out. There was very little demand for them. Men did not cultivate more than one-half or two-thirds of the acreage that he had done before. They had no new implements, and all the carriages and farming implements were almost worn out.
>
> * * * * * * *
>
> "Q. 40. What would you say, as a minimum, was the depreciation of all personal property in Virginia in June, 1863, upon the basis of any sort of sound money? What was the per cent of depreciation in June, 1863, as compared with January, 1861?
>
> "A. Not less than 50 per cent. There had been no repairs made to furniture. All the mechanics were in the army. If a bed broke down, a man had to fix it the best way he could. The same way with all farming utensils and everything else.
>
> * * * * * * *
>
> "Q. 50. From your observation and knowledge at that time, what was the condition of the people of Virginia in the territory now constituting the Commonwealth?
>
> "A. A large proportion was abject poverty."

See the testimony of the other witnesses above named to the same effect.

(*d*) The above-mentioned witnesses prove, what is so a part of the history of the country and the times as to require

no proof, that in Confederate Virginia in June, 1863, the paper money of the Confederate States was the currency of the people, in which, and with reference to which their contracts were made and their business transacted; that it was practically the only medium of exchange and standard of value, the currency in which all State taxes were levied and were payable, and as a necessary consequence from these uncontroverted and incontrovertible facts, that it was the currency in which or with reference to which as a measure of value, the annual assessments of personal property for taxation were generally made in the portions of the State dominated by the Richmond governments. As to these points see the testimony of R. W. Hunter, R., 744, answers to Q.'s 36, 37, and 38; W. W. Scott, R., 749, answers to Q.'s 14 to 20; of Col. John P. Branch, R., 754, answers to Q.'s 14, 15, and 17, and page 758 and answers to Q.'s 43 to 50; of Major Wellford, R., 765, answers to Q.'s 46 to 50; of Mr. William G. Taylor, R., 768, answers to Q.'s 6 to 12; of Mr. S. H. Hawes, R., 773, answer to Q. 24; of Mr. C. U. Williams, R., 781, answers to Q.'s 1 to 5 on redirect examination. Messrs. Taylor (R., 768-9) and Williams (R., 781) both state in effect that taxes were then assessed in Confederate money.

(*e*) The fact that the assessments of personal property made as of February 1, 1863, were generally made in Confederate Virginia with reference to Confederate values and in Confederate money, and that those assessments were excessive valuations of personal property, if they be treated as valuations in good money, appears from a comparison of the assessments in the counties of Confederate Virginia for 1863 with the assessments of personal property generally in the same counties in 1861, incomplete copies of which assessments are returned by the master with his report.

See also Acts of General Assembly of Virginia at Richmond, of March 22, 1862, and March 28, 1863, making State taxes payable in Confederate money (Appendix to the Record, page 132).

(*f*) Under the foregoing state of facts, and upon the evidence in the cause, the scale of depreciation of Confederate money as compared with specie, which was 4 for 1 on the 1st of February, 1863, should have been applied to all of the assessments of personal property in 1863 in the Virginia counties which were then occupied and dominated by the military and civil forces of the Richmond governments, State and Confederate.

Particularly should this have been done as to the slaves everywhere in Virginia.

(*g*) Upon the above-mentioned proofs the valuation of all personal property in Virginia on the 20th of June, 1863, cannot be fairly estimated at more than one-half of its assessed value for that year.

V. *Complainant's Fifth Exception.*

Complainant respectfully excepts to the finding of the special master under the seventh paragraph of the decree, that "the State of West Virginia received nothing in money from the Commonwealth of Virginia," subsequent to the organization of the Restored Government of Virginia, and for omitting to charge West Virginia with the sums aggregating $170,771.46, paid by Virginia to West Virginia as shown by Plaintiff's Exhibit G-1 (R., p. 819), and the evidence in support thereof (Special Master's Report, pp. 181 and 193).

It will be observed that the master was required by paragraph VII to ascertain and report *all* money which West Virginia received from Virginia, however or whenever received.

The facts as to the receipt by West Virginia from the Commonwealth of the amounts aggregating $170,771.46 stated in Plaintiff's Exhibit G-1 (R., 819), are assented to and certified by the accountants for both parties, and are reported by the master at page 181 of his report.

Note to the Fifth Exception.

It is proper here to call attention to the fact that the special master has included in the charges against West Virginia, under the seventh paragraph of the decree, the value of the stock which represented the amounts expended by the Commonwealth on the turnpikes and bridges built by the following companies:

Sweet and Salt Sulphur Springs Turnpike Co...	$7,578.00
White and Salt Sulphur Springs Turnpike Co...	4,000.00
Fairmount and Palatine Bridge Co.....	12,000.00
	$23,578.00

The complainant has insisted that the expenditures made by the Commonwealth in the construction of these internal improvements should be charged against West Virginia under paragraph III of the decree, and by her first exception above has objected to the master's report for not charging West Virginia with items 60, 136, and 145 of joint Exhibit C-1 (R., pp. 375 and 377), which items cover the expenditures made by Virginia on said Fairmount and Palatine Bridge and on the Sweet and Salt Sulphur and White and Salt Sulphur Turnpikes.

If complainant's first exception is sustained as to those items, the corresponding items charged by the master under paragraph VII of the decree, aggregating $23,578.00, should be deducted from the aggregate charged against West Virginia under said seventh paragraph.

VI. *Complainant's Sixth Exception.*

In addition to the five exceptions above set forth, complainant respectfully asks that all of the alternative statements contained in the master's report, made at the request

of and pursuant to objections interposed before the master by the complainant, and not covered by any of the foregoing exceptions, may be taken and treated as exceptions made by the complainant to said report because of and with respect to the errors of law appearing on the face of said report and of the record returned therewith, in the particulars to which said alternative statements respectively refer.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
By SAM'L W. WILLIAMS,
Attorney General.

WILLIAM A. ANDERSON,
RANDOLPH HARRISON,
JOHN B. MOON,
Of Counsel for Complainant.

[Endorsed:] Supreme Court of the U. S. October Term, 1909. No. 3, Original. Commonwealth of Virginia *vs.* State of West Virginia. Complainant's Exceptions to Report of the Special Master, dated March 17, 1910. Office of Attorney-General of Virginia, Richmond.

[Endorsed:] Supreme Court U. S. October Term, 1909. Term No. 3, Original. Commonwealth of Virginia, Complainant, *vs.* State of West Virginia. Complainant's exceptions to report of the Special Master, dated March 17, 1910. Filed April 16, 1910.

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Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 2, ORIGINAL.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF ON BEHALF OF THE BONDHOLDING CREDITORS OF THE COMMONWEALTH OF VIRGINIA.

HOLMES CONRAD,
Counsel for the Bondholding Creditors of Virginia.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. , ORIGINAL.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF ON BEHALF OF THE BONDHOLDING CREDITORS OF THE COMMONWEALTH OF VIRGINIA.

The Case.

In the first quarter of the nineteenth century the Commonwealth of Virginia entered upon a system of public internal improvements which, it was contemplated, should include the entire territory of the State. This system embraced in its design the construction of graded roads, bridges, canals, and railways, extending through the State from tidewater toward the Ohio river, and adapted not to the needs of any one region of the State only, but of the State as a unit in interest. The construction of these works was interrupted by the outbreak of the civil war, and their completion was prevented by the separation of the territory now form-

ing the State of West Virginia and the erection thereon of that new State. The cost of the construction of these works, so far as that construction had progressed up to the first day of January, 1861, was defrayed by the proceeds of loans made in the United States and in Europe, and evidenced by the bonds of the Commonwealth of Virginia, which were issued from time to time, as the exigencies of the work required, under the authority of several acts of the General Assembly of Virginia.

The amount of the public debt of the Commonwealth of Virginia, evidenced by the bonds issued under these acts, was, on the first of January, 1861, $33,897,073.82.

On the 20th day of August, 1861, certain citizens of Virginia, residing in the western parts of the State, assembled in convention in the city of Wheeling, and there adopted an ordinance to "provide for the formation of a new State out of a portion of the territory of this State," and, prior thereto, there was organized a form of government known as the "Restored State of Virginia."

On the 31st day of December, 1862, an act was passed by the Congress of the United States, which provided that the new State formed in pursuance of the ordinance aforesaid should, upon certain conditions, be admitted into the Union by the name of "West Virginia," with a constitution which had theretofore been framed for it and adopted by the people of that territory.

On the 20th day of June, 1863, the new State of West Virginia was formally admitted into the Union as one of the coequal States thereof.

The constitution under which the new State was admitted into the Union contained, among other provisions, the following, viz:

> "No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war.

"The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank.

"An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

Sections 5, 7, and 8 of Article 8 of the Constitution.

From the year 1865 down to a short time before the institution of this suit the Commonwealth of Virginia had sought in every practicable way to obtain from West Virginia a friendly settlement of the matter, looking to the ascertainment of the reasonable and proper proportion of the public debt of the Commonwealth of Virginia, which, by her constitution, that State had assumed to pay; but, after her liability for an "equitable proportion" had thus been recognized for many years, West Virginia, by a subsequent convention, withdrew such formal recognition from her constitution, and, by repeated acts of her legislature, expressly disclaimed any liability whatever for any part of such public debt.

Appendix to the Record, p. 247.

Virginia, deprived of one-third of her territory and population, divested of those vast mineral sources of wealth, by the development of which she had reasonably expected to redeem her obligations, acquire a fixed and certain source of revenue, and restore contentment and happiness to the inhabitants of her western parts, had yet retained her credit in the money markets of the world, and no cloud of doubt

had as yet been cast upon her willingness and her ability to discharge her obligations.

The attitude assumed by those in control of the political government of West Virginia made it necessary for Virginia to act promptly and decisively with reference to her outstanding obligations.

By act approved March 30, 1871, the General Assembly of Virginia provided that—

> "The owners of any of the bonds, stocks or interest certificates heretofore issued by this State, which are recognized by its constitution and laws, as legal, except the five per centum dollar bonds, and what are known as sterling bonds, but including the stock of the James River Company, and the bonds of the James River and Kanawha Company guaranteed by this State, may fund two-thirds of the amount of the same, together with two-thirds of the interest due or to become due on the first day of July, 1871, in six per centum coupon or registered bonds of this State, of the denomination of one hundred and multiples thereof, dated that day, and to become payable and due in thirty-four years after date, but redeemable at the pleasure of the State, after ten years, the interest so to be payable semi-annually, on the first days of January and July of each year. * * * The holders of the five per centum dollar bonds, may, in like manner, fund the same in like bonds, bearing five per centum, instead of six per centum interest."
>
> "3. Upon the surrender of the old, and the acceptance of the new bonds for two-thirds of the amount due, as provided in the last preceding section, there shall be issued to the owner or owners for the other one-third of the amount due upon said old bond, stock, or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded, as provided in the last preceding section, and that payment of said amount, with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall thereafter be had between the States of Virginia and West Virginia, in regard to

the public debt of Virginia existing at the date of the dismemberment, and the State of Virginia holds said bonds, as far as unfunded, in trust for the holder or his assignees; and provided further that until such final settlement with West Virginia, there shall be paid upon what are known as sterling bonds, in the manner now prescribed by law, two-thirds of the interest accruing on said bonds, after July first, 1871, and for the interest accrued to that date, certificates, dated on that day, shall be issued, drawing the same rate of interest as the bonds, two-thirds of which shall be paid as provided to be paid on the bonds. The remaining one-third of unpaid interest, both as to the bonds and the certificates shall be payable in money, and the principal of said certificates in new sterling bonds of the same character as the old, in accordance with such final settlement as may be made with West Virginia."

Under this act of 1871, and under the subsequent acts of 1879, 1882, and 1892, bonds and other evidences of indebtedness to the amount of several millions of dollars were surrendered by the holders thereof, and new bonds of the Commonwealth of Virginia, for two-thirds of their several amounts, and certificates for the other one-third of such amounts—representing the estimated proper proportion of such indebtedness to be borne by the State of West Virginia—were issued by Virginia and accepted by the holders of the old bonds who had surrendered them.

Under a joint resolution of the General Assembly of Virginia, approved March 6, 1894, and an act of March 6, 1900, a commission was created and—

> "authorized and empowered, by and with the advice and approval of the attorney general of Virginia, to take such action and institute such proceedings on behalf of the State as may, in the judgment of said commission and attorney general, be needful and proper to protect the interest of the State, and bring about, and carry into effect a settlement as aforesaid" (1 May's Compend., pp. 40-44).

On January 15, 1905, the commission addressed a communication to the Governor of West Virginia, which was approved by the attorney general of Virginia, and on the first of February, 1905, Mr. Randolph Harrison, a member of the commission, and on behalf of the commission, made an address before the finance committee of the legislature of West Virginia, in which he set forth fully and clearly the grounds on which a friendly adjustment of the matter should be entered upon by the two States (1 May's Compend., pp. 68-82).

On January 20, 1905, the legislature of West Virginia had adopted the following joint resolution, viz.:

> "*Resolved by the legislature of West Virginia*, That it is the sense of this legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on the subject" (Appendix to Record, p. 248).

On the — day of ——, 1906, the Commonwealth exhibited her bill in equity in this court, in which are set forth fully and distinctly the grounds on which she asked the relief there prayed, and invoked the aid of this court to protect her from the intolerable burden of that proportion of the public debt incurred by the Commonwealth of Virginia during a period of forty years prior to the erection of the new State within her ancient borders, and created, as the bill charges, by the hearty concurrence and earnest efforts of the representatives in the legislature from that region of the old State which now forms the State of West Virginia, and which should be borne by West Virginia.

In February, 1907, the State of West Virginia appeared, by her attorney general, and tendered a demurrer to the bill on eight assigned grounds. On the argument before the court the defendant State, through her counsel, assigned a wholly distinct ground, on which the argument mainly proceeded. That ground was that a compact had been entered

into between the two States, by the terms of which the legislature of West Virginia had been made the sole arbiter of the fact and the amount of West Virginia's liability, and that this court was without jurisdiction to hear and determine that question.

The demurrer was overruled on all the grounds assigned and argued, and the defendant State was required to answer the bill.

In October, 1907, West Virginia filed her answer to the bill.

On May 4, 1908, a decree was made referring the cause to a special master, with directions to ascertain and report on seven designated subjects of inquiry. The special master heard the evidence offered on either side, and in March, 1910, he filed his report to this court, with certain documents referred to and more specifically indicated in a letter accompanying his report, and to be read and considered therewith.

(NOTE.—The attorney general of West Virginia has caused to be printed and has distributed a correct transcript of the pleadings in the cause, with all the proceedings had thereon, the oral and printed arguments of counsel, and the orders and decrees made in the cause, which by consent, with the approval of the court, will be used and cited in the further arguments offered, in lieu of or in connection with the original record.)

The Pleadings in the Case and the Issues Resulting therefrom.

In The State of Rhode Island *vs.* The State of Massachusetts, 14 Peters, 257, this court said:

> "The proceedings in this case will therefore be regulated by the rules and usages of the court of chancery. Yet, in a controversy where two States are contesting the boundary between them, it will be

> the duty of the court to mould the rules of chancery practice and pleading, in such manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of chancery pleading. * * * And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength."

That was one of the earliest cases brought before this court presenting a controversy between two States, and the views expressed there have since been somewhat modified; but we do not object to their application here in their strictest form.

Attention is called to the case presented in the bill and the answer, as showing what facts alleged in the bill are admitted in the answer, and what denials made in the answer are responsive to any allegations made in the bill, and also to the affirmative averments made in the answer which the defendant State, under the rules of chancery practice, must support by proof, but has wholly failed to do.

The bill is arranged in twenty-two numbered paragraphs, the first twenty of which each contains a distinct charge of some material fact. The answer following this order takes notice of each of these distinct charges of fact and undertakes to reply to them.

(1.) The bill charges that on the first day of January, 1861, Virginia was indebted in the sum of about $33,000,000, evidenced by her obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory, and that in addition to the above liability there was a large indebtedness to the commissioners of the sinking fund and to the literary fund of the State.

The answer of the defendant admits the charge of the

amount of the debt of $33,000,000, but denies the charge of indebtedness to the two boards.

(2.) The bill charges that "the completion of some of the main lines of improvement beyond the said range, and through to the Ohio river, *since the first day of January, 1861*, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory, now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines east of said range been first constructed."

The answer of the defendant denies "that such increase was caused by the improvements made within her present territory *prior to 1861*, but nearly all of the improvements and developments of resources in said State have been made within the last twenty-five years, and are due to railroads and other public works constructed by her own people and by private capital brought within her territory, and by appropriations made by Congress and are *almost* entirely disconnected and independent of any expenditures made by Virginia prior to January 1, 1861, either by the proceeds of bonds issued and sold by her, or from any other means derived from the creation of any debt by her."

(3.) The bill charges that Virginia entered upon this scheme of internal improvements, in a very large measure, for the purpose of developing the resources of the western part of the State, now constituting West Virginia, and that it was with this view that she took upon herself the burden of debt for which her bonds were issued, and that in corroboration of this, as she further charges, the public records of the legislature show that the appropriations for the improvements, and the indebtedness incurred by the bonds issued therefor, were carried through the legislature by the votes of the members of the house and senate from the counties now forming the State of West Virginia, and against the votes of the members from the counties now forming Virginia.

The answer denies the charge of the motive and purpose, but admits the charge as to the votes of the members from the western counties.

(4.) The bill charges that the system of public improvements was incomplete in 1861, "though a very considerable portion of such improvements had, prior to that time, been constructed in the territory now constituting West Virginia in order to meet the needs of the people in that portion of the State for their local purposes."

The answer denies this charge in the very words in which it was made, and yet the report of the special master, under article 1, pages 31-36, shows hundreds of turnpikes, railways, and navigation companies constructed in the western parts of the State with the proceeds of these bonds long prior to 1861.

(5, 6, and 7.) These charges of the bill are not denied in the answer.

(8.) The bill charges, and sets out in exact terms, certain acts of the legislature of the restored State of Virginia, and states their legality and effect.

The answer does not deny the acts as recited, but denies the effect given to them in the bill.

This is matter of construction for the court.

(9.) The bill charges another act of that legislature.

The answer admits the act, but denies the effect given to it by the bill.

(10.) The bill recites certain provisions in the constitution of the State of West Virginia and states their effect.

The answer admits the provisions, but denies the effect as given in the bill, yet this court, in passing on the demurrer to the bill, has distinctly held that the effect charged by the bill was the true effect, and that the words "public debt" and "previous liability" referred to the public debt of Virginia and to nothing else.

(11.) The bill charges that after the year 1865 and prior to the year 1872 Virginia had made many attempts to have

the amount of West Virginia's liability on account of the public debt ascertained, but without effect.

The answer, through six of its pages, denies this charge, which is now established beyond dispute by the production of the official records of the two States.

(12.) The bill charges the efforts made by Virginia alone to effect a settlement with her bondholding creditors after her efforts to secure the co-operation of West Virginia had failed.

The answer makes no denial, but indulges in irrelevant comments on Virginia's course.

(13.) The bill charges that since the first day of January, 1861, Virginia has actually paid off, retired, and discharged, or has assumed and given her new obligations for the aggregate sum of over seventy-one million dollars on account of the common debt; that West Virginia, in the early years of her history, conceded that she should bear an equitable portion of this common debt, but that she has for a number of years refused to recognize that any liability whatever rested on her on that account.

The answer does not deny this charge, but contents itself with the remark that "this is a matter of which the Commonwealth of Virginia cannot complain."

(14.) The bill charges that by the acts for the settlement of her debt it was provided that the bonds of Virginia, so far as not funded in the new obligations issued by her, should be surrendered to and held by her, who would hold the same, so far as unfunded, in trust for the creditor who deposited the same, or his assigns, and certificates to this effect were given by her to each creditor who so surrendered.

The answer, not denying this charge, affirmatively avers that all the bonds so deposited were in fact "surrendered and cancelled," and that the Commonwealth of Virginia now holds said certificates in trust only for the owners thereof.

Which, with great respect for the State of West Virginia,

we venture to characterize as sheer nonsense and contradicted by the acts themselves.

The answer further denies, under this article, that "Virginia used any means for an amicable settlement of said debt with West Virginia, except as stated in paragraph XI of the answer."

(15.) The bill charges that as she has taken up and holds nearly all of the old bonds issued by her, she has now the right to call on West Virginia for a settlement, etc.

The answer, not denying the fact charged, denies that this fact gives Virginia a right to call on West Virginia for a settlement.

(16.) The bill charges that by reason of the facts charged she has a right and a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

The answer denies that Virginia has any claim against West Virginia on account of any payments made by Virginia; denies that West Virginia is liable for any part of the obligations mentioned in paragraphs 15 and 16 of the bill.

(17.) The bill charges the existence of certain obligations on which Virginia was bound prior to 1861 as guarantor, which should be included in the proposed settlement with West Virginia.

The answer denies the liability of West Virginia on account of such debts.

(18.) The bill charges as a recapitulation five grounds, on all or either of which West Virginia should be held liable for a proper proportion of the public debt of Virginia.

The answer denies that West Virginia is liable on any of these grounds except the second.

The second ground, as is manifest, is but a historical fact, which is recited, without any admission of its validity or force, in the same manner and to the same extent that a debtor who admits and agrees to pay a debt barred by limitations may be held liable on it, even though the deed in which such admission be made be held void and fraudulent.

(19, 20.) The bill charges that by a joint resolution, approved March 6, 1894, and by an act approved March 6, 1900, of the General Assembly of Virginia, a commission was created to bring about a settlement with West Virginia, and that such commission did "make most earnest efforts to bring about an amicable settlement of the matter."

The answer appears to deny the facts charged, and indulges in several pages of explanation.

This concludes all the charges of fact made in the bill and all the responses made to these charges by the answer of the defendant.

But the defendant did not stop in its answer with these responses, but proceeded to aver certain affirmative grounds of defense to the case presented by the bill, which were not responsive to any charge made in the bill, but rest upon the construction given to certain ordinances and acts of the legislature which are set out in the bill.

(1.) In paragraph XX of the answer (May's Comp., p. 22) it is averred as follows, viz.:

> "And so this respondent is advised and now avers, that when West Virginia framed her constitution and inserted in it the provision concerning the adjustment of the public debt of Virginia, and the Commonwealth of Virginia, through her legislature, by the act aforesaid approved the constitution of West Virginia, as the basis of her consent for the formation of that State and her admission into the Union, and upon the passage of the act of Congress admitting the said State into the Union, *a compact between the two States prescribing the manner in which this respondent's equitable proportion of the debt should be ascertained was concluded, and it became, and is binding upon the Commonwealth of Virginia and the State of West Virginia.*
>
> "The respondent avers that her equitable proportion of said debt cannot be otherwise ascertained or determined than by the action of the State of West Virginia, through her legislature, as provided by her constitution, nor can its liquidation be otherwise pro-

> vided for than by a sinking fund of sufficient amount to pay the accrued interest and redeem the principal of whatever sum may be thus ascertained within the period of thirty-four years as likewise therein provided. *Respondent therefore pleads and relies upon said compact in bar of plaintiff's right to prosecute and maintain this suit in this honorable court, and prays that the said bill may be dismissed.*"

(2.) The second ground of defense, nearly allied to the first, but so as with a difference, rests upon the ninth section of the ordinance passed by the convention of August, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State." It appears that the people who assembled in that August convention, with the purpose and intent of converting the territory of the "Restored State of Virginia" into the new State of West Virginia, recognized that some provision must be made for meeting and discharging such proportion of the public debt of the Commonwealth of Virginia as must reasonably be borne by that portion of the territory and population of the ancient Commonwealth which they proposed to erect into a new State, before the Congress of the United States would admit such new State into the Union, and accordingly they attempted to insinuate into the ordinance providing for such new State this ninth section, by which a fantastic device was contrived for relieving the new State of any liability whatever for any part of said public debt.

The XX paragraph of the answer avers as follows, viz.:

> "And when the constitution of West Virginia was framed and adopted in the year 1861, the said section nine was in full force, and both the Commonwealth of Virginia and the citizens residing in that portion thereof out of which the proposed new State was to be formed, were satisfied with the methods therein provided for ascertaining this respondent's equitable proportion of said public debt, and the constitution was framed and adopted *and West Vir-*

ginia's equitable proportion of said public debt was assumed on the basis of the said ordinance and not otherwise."

In these two grounds so set out in the answer of West Virginia there is presented the sole defense which she here sets up to the demand of the bill, that she should be required to contribute to the discharge of a reasonable and proper proportion of the public debt of Virginia, created prior to the erection of the new State. Much of these grounds of defense has already been disposed of by this court in the decrees heretofore made in the cause, and the disposition of the several members of the court is quite unmistakably indicated in the course of the oral arguments made at the bar on the demurrer and on the order of reference. These are more minutely pointed out in the subsequent parts of this brief.

The contention made on behalf of West Virginia, then, is that the ninth section of the Wheeling ordinance, providing a method or scheme for ascertaining the equitable proportion of the public debt of Virginia, was a proposition made by Virginia to the inchoate State of West Virginia, and subsequently accepted by that State, and thereby became and continues a constituent term in a compact entered into between these two States.

That such ninth section was a valid, constitutional, and operative feature in the ordinance to provide for the creation of a new State out of a portion of the territory of Virginia.

It does indeed appear that the attorney general of Virginia seems to have assented to much of this view. In his oral argument before the court, at the October term, 1896, after reciting the ninth section of the ordinance, he said:

> "This is the basis upon which the consent of the Commonwealth of Virginia was given to the formation of the new State. The stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given, and which afterwards,

> in forming the State of West Virginia, the people of that new Commonwealth accepted and assented to, was that the new State should assume and take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, *to be ascertained in the manner therein prescribed. That was a fundamental as well as a contractual provision, and it constitutes a primary obligation and lies at the very foundation of the right of West Virginia to be a State*" (1 May's Compend., p. 325).

And again, in his printed brief (2 May's Compend., p. 136), this learned attorney general says:

> "While the basis of settlement prescribed by the Wheeling ordinance, is, as we have always considered it, arbitrary and inequitable, we have never taken the position that that ordinance, reasonably and fairly construed, and taken and applied together with the Act of the Restored Government of Virginia of February 3, 1863, and section 8 of Article VIII, of the Constitution under which West Virginia became a State, was not binding on both States."

The writer of this brief, who, by the grace of this court, has been permitted to appear and argue this case on behalf of the bondholding creditors of the Commonwealth of Virginia (who are the sole beneficiaries under that trust which Virginia assumed, and in execution of which this suit was in large measure brought and prosecuted, and who must be the sole recipients of whatever amount may be here recovered), dissents in toto from the views expressed by the attorneys general of the two States respectively, and he has in the subsequent parts of this brief ventured to expose the fallacies which infect the views so presented. He will endeavor to show under subsequent headings in this brief:

> 1. That the ninth section of the ordinance was not "the basis upon which the consent of the Commonwealth of Virginia was given to the formation of the

new State." But that such ninth section was never, for one instant of time, recognized by any convention or legislature as having any binding force upon either State or person, and that as a proposition made by Virginia to West Virginia it was never accepted by the latter State.

2. That the ninth section was not "a stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given and which was afterwards accepted and assented to by the people of West Virginia."

3. That it was not "a contractual or a fundamental provision, and that it did not constitute a primary obligation, or lie at the foundation of the right of West Virginia to be a State."

West Virginia became a State by being admitted into the Union by the Congress of the United States, upon the consent, first obtained, of the Restored State of Virginia, and such consent, in its express terms, referred to the constitution framed for West Virginia, and did not by expression or implication refer to the ordinance or to any of its provisions.

4. The "basis of settlement prescribed by the Wheeling ordinance," whether taken alone or in connection with any legislation or constitutional provision, was never binding "on both States" or on either State.

It was not referred to in the case of Virginia *vs.* West Virginia, in 11th Wallace, and, as shown by Mr. Faulkner, the counsel for West Virginia in that case, had no relevancy or connection with the line of argument taken by either the counsel or the court in that case.

The bondholding creditors, whose interests this court has allowed to be represented here, are creditors of Virginia and of West Virginia alike. They are not formal parties to this

cause, but their interests are fully recognized and secured by the several acts of the General Assembly of Virginia, which form part of this record, and under which Virginia has received and holds the bonds deposited by them, as a trustee, as to the unfunded one-third of the amounts of such bonds. The Commonwealth of Virginia has by her bill exhibited here disclosed fully her relations to her bondholding creditors and to the State of West Virginia, who, as a constituent part of the original debtor State, is liable for an equitable proportion of such common debt. Her chief ground for the relief asked is that West Virginia has disclaimed and repudiated all liability for any part of such indebtedness, and Virginia fears that unless this codebtor be made to pay such equitable portion of the debt that the burden of paying it will fall upon her. She asks that this threatened danger be averted by a decree of this court requiring West Virginia to pay so much of such debt as may be ascertained to be her equitable proportion thereof.

These creditors insist that they should not be prejudiced in their rights by any contracts or agreements entered into between the two debtor States, or by any concessions or admissions that may be made as either the law or the facts by the counsel representing these States at this bar.

It will be observed that of the seven subjects for inquiry and report referred to the special master, five of them relate exclusively to the matters involved in the ninth section of the Wheeling ordinance. The master now reports, under the third paragraph of that order of reference, that the plan of ascertainment proposed by the ninth section of the ordinance bears no relation whatever *to the amount of the public debt.*

It may not unreasonably be inferred that such inquiry would not have been directed by the court but for the apparent concurrence of view of the attorneys general of the two States.

THE ARGUMENT.

The bill was filed by Virginia to have ascertained the proportion of the public debt of the Commonwealth of Virginia which should justly and equitably be borne by West Virginia, and to require her to pay such amount to the exoneration of Virginia from that portion of the common burden.

The first and controlling subject of inquiry is, What plan or method shall be adopted for ascertaining this proportion? But two have been proposed and urged by the parties to the cause.

It would seem to be obvious that the proper proportion of this public debt which should be borne by West Virginia should be ascertained by the proportion that her territory and population bore to the territory and population of the Commonwealth of Virginia on the first day of January, 1861, or on May 13, 1862, when Virginia consented to the erection of the new State, or on the 20th of June, 1863, when West Virginia was admitted into the Union.

On the part of Virginia and of her bondholding creditors, who are the beneficiaries of the trust which Virginia took upon herself, it is insisted that the only just and reasonable plan or method for ascertaining the proportion of the debt to be borne by West Virginia is that stated and approved by the writers on international or public law, and which was announced by Mr. Justice Field, in delivering the opinion of this court, in the case of Hartman *vs.* Greenhow, 102 U. S., 672. He said:

> "Duringthe war a portion of her territory was separated from her, and by its people a new State named West Virginia, was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were taken from her jurisdiction. But as the whole State had created the indebtedness for which the bonds

> were issued, and participated in the benefits obtained by the money raised, it was but just that a portion of the indebtedness should be assumed by that part which was taken from her and made a new State. Writers on public law speak of the principle as well established, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them. On this subject, Kent says: 'If a State should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement, their rights are to be enjoyed, and their obligations fulfilled by all the parts in common' (1 Comm., 25). And Halleck, speaking of a State divided into two or more distinct sovereignties, says: 'In that case the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratable binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of the courts and the practice of nations' " (International Law, c. 3, sec. 27).

Among the writers on public law, referred to by the learned justice, whose opinions concur in the view expressed by him, there may be mentioned the following:

Puffendorf, Law of Nature and Nations, Book VIII, chap. 12, sec. 5.

Phillimore, International Law, Part II, chap. 137.

Wheaton, Dana's ed., sec. 30.

Moore's Int. Law Digest, p. 334.

Wharton, Int. Law Digest, sec. 5, p. 19.

1 Openheim International Law, p. 122.

5 Moore on International Arbitration, pp. 4618-4619.

Mr. Hannis Taylor's International Law is cited with great approbation by the counsel for West Virginia and copious extracts from his chapter on this subject are quoted. Mr. Taylor, however, closes this chapter with a "summary" of

his views, which seems to have escaped the attention of counsel. It is as follows:

> "SEC. 168. After a careful review of all the authorities the general statement may be made, (1) That no matter whether a State is entirely extinguished by a division into two or more States, or (2) whether it loses its identity by being absorbed into another State, or (3) whether a State, without loss of its identity, has a portion of its territory taken from it to form an integral part of another State, or (4) whether such severed part is erected into an entirely new and independent State, all local charged and guaranteed debts to which certain domains and their revenues are dedicated survive as charges upon the localities to which they relate, with their equities unimpaired. In the case first named the general debt of the State would certainly be ratably binding, morally, if not legally, on its several parts. In the second, it passes as a whole to the absorbing State. In the third, the acquiring State should assume a ratable proportion of it, and in the fourth, every principle of equity and good conscience requires that it should be provided for out of the common State property, and the residue divided in the proportion to the resources of the two distinct Commonwealths. *In the notable case of West Virginia that obligation, though formally recognized, has never been discharged.*"

The public debt of the Commonwealth of Virginia is evidenced by her bonds issued by her, under the authority of several acts of the General Assembly, from the year 1823. These bonds are shown in the schedules annexed to the two first paragraphs of the report of Special Master Littlefield, as to which the master says (Report, p. 29):

> "The schedules hereto annexed and marked Par. I, Ex. 1, Par. I, Ex. 2; Par. I, Ex. 3, show by what authority of law, and for what purposes the same was created, and the dates and nature of the bonds being the evidence of said indebtedness."

From these schedules there has been compiled a series of tabulated statements showing that these bonds fall into eight distinct groups, distinguished by the purposes for which each series of bonds was issued, the rates of interest borne by each, and the proportion of each which should be borne by Virginia and West Virginia respectively. There is further shown the calculations made upon the established bases of territory, population, and valuation, by which is ascertained the exact proportion of the entire debt which West Virginia should bear on each of such bases.

West Virginia's Proportion of the Public Debt under Paragraphs I and II.

The amount of the public debt of Virginia as found by the master.....	$33,897,073.82

Annexed to the report, under paragraph I, are three tabulated schedules which, the master states, "show by what authority of law and for what purposes the same was created, and the dates and nature of the bonds being the evidence of said indebtedness" (page 29).

It appears from Schedule 3 that of the bonds evidencing this debt certain of them bore interest from their date to their maturity at the rate of six per cent per annum to the amount of.....	$30,842,659.43
and certain others bore interest at the rate of five per cent.....	2,077,204.50
Making the total of interest-bearing principal	$32,919,953.93
Which, with the interest accrued thereon to January 1, 1861.....	977,209.89
makes the aggregate debt as of January 1, 1861	$33,897,073.82

The master was directed to ascertain and report the extent and assessed value of the territory of Virginia and of West Virginia as of June 20, 1863, and the population thereof, with and without slaves.

He has responded to that direction in paragraph 11, page 37, of his report, by a tabulated statement, which shows that—

West Virginia contains of the extent of the area of the old State	36.1843 per cent
and of the land area, exclusive of water	37.3686 per cent
and of the assessed valuation	21.7812 per cent
and of the population, with slaves	24.5125 per cent
and of the population, without slaves	33.5231 per cent

From the evidence taken before the master, and which appears in the printed volume accompanying his report (pages 341-379), I have had prepared a tabulated statement, which will be found in the printed pamphlet filed as part of this brief, which shows, on pages 16 and 17, West Virginia's proportion of the public debt, calculated on each of the foregoing bases, *including* therein the bonds held by the sinking fund, the literary fund, and the board of public works.

West Virginia's proportion on the basis of land area	$39,637,940.59
West Virginia's proportion on the basis of total area	38,381,719.81
West Virginia's proportion on the basis of assessed valuation	23,103,940.50
West Virginia's proportion on the basis of population, with slaves	26,003,229.86
West Virginia's proportion on the basis of population, without slaves	35,528,615.64

Since the master's report was returned, showing that he has rejected the claim of Virginia to have the bonds held by

these State boards, included in the total amount of the public debt, evidenced by the State bonds, I have had the calculation made on that basis (it appears in two printed pages filed in the pamphlet with brief):

Land area	$36,595,744.45
Total area	35,435,938.09
Assessed valuation	21,330,722.30
Population, with slaves	24,007,492.37
Population, without slaves	32,829,776.90

The pamphlet filed with this brief shows that the public debt of Virginia on the first of January, 1861, was evidenced by bonds issued under different acts of the legislature, maturing at different periods, and bearing different rates of interest. These bonds are classified in eight separate groups, an index of which appears on page 1 of the pamphlet, and each of said groups is presented as required by paragraph I of the decree.

If the liability of West Virginia is determined in accordance with the doctrine laid down by the writers on public or international law, which appears to have been approved by this court in Hartman *vs.* Greenhow, *supra*, such liability must be for an ascertained proportion of the public debt of Virginia evidenced by said bonds, such proportion to be ascertained on one or the other of the several bases above calculated. The public debt for which West Virginia is liable is the debt evidenced by the bonds, and must be, therefore, for the principal of said bonds and the interest that accrued thereon up to the maturity thereof. The interest has been accordingly calculated on each of the eight groups of bonds according to rate prescribed by the bond and up to the date of its maturity.

The constitution of West Virginia, under which she was admitted into the Union, provided that—

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by the State," &c.

An equitable proportion of the public debt as it stood on January 1, 1861, embraced both the principal and the interest of the debt as it was then evidenced, and if it was evidenced by bonds that bore interest until they were redeemed or paid, West Virginia's proportion of the debt so evidenced, embraced the principal and the interest thereon up to the redemption of the bond or to the expiration of the period through which, according to its terms, the bond bore interest.

Even against a sovereign government, when its consent to pay interest "has been manifested by an act of its legislature, or by a lawful contract of its executive officers, interest has been allowed" (United States *vs.* North Carolina, 136 U. S., 216). The United States has been required to pay interest in one case on an implied contract (United States *vs.* New York, 160 U. S., 598).

Both on the ground of public or international law and on the express provision of the constitution of the State, under which Congress admitted it into the Union, the liability of West Virginia for an equitable proportion of the public debt of Virginia appears to be unavoidable and, indeed, does not appear here to be questioned.

We have then "the amount of that public debt as of January 1, 1861, the form in which it was evidenced, the authority of law by which it was created, and the dates and nature of the bonds and other evidence of said indebtedness." We have the extent and assessed valuation of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves. We have then every factor necessary for a correct ascertainment of the actual amount of the equitable proportion of the public debt which West Virginia should contribute, and we have all the calculations accurately made on each of the several bases indicated by the court in its decree, and we show what that proportion is under each of said several bases.

Of the five several bases on which the ratable proportion of the debt to be borne by West Virginia may be ascertained, the least reliable is that of the "assessed valuation" of the real and personal property. The last assessment of real estate prior to January 1, 1861, was made in 1856, the assessments being at that time made every ten years, and the master has shown in his treatment of this subject, under paragraph V (pages 142 to 173), that the assessment of that year forms no safe or fair basis. He has pointed out that both real and personal property suffered great depreciation in quantity and in value during the early period of the war.

Paragraphs IV and V of the decree do not appear to have been intended by the court as the means of affording bases for the ascertainment of the proportion of the *public debt to be borne by West Virginia*, but only, as their language imports, for affording a basis for ascertaining "such proportion of the *ordinary expenses of the government of Virginia* since any of said debt was contracted as was properly assignable to the counties which were created into the State of West Virginia."

Paragraph II (page 37) directs the ascertainment of "the extent and assessed valuation of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves."

The decree gives no direction that warrants the distinction taken in the report between the land area and the water area of the two States. It only directs that the "extent of the territory" be ascertained. The difference is too small to justify a formal exception to the report on that ground, and we submit that as valuation is the object sought, and as land only, and not the water surface, was the subject of valuation, that the land area affords the only proper basis.

As to the matter of "slaves," they appear in both the States, but in far greater number in Virginia, in proportion to the entire population, than in West Virginia. How far they should be taken into any account in this case is ques-

tionable, because their status as persons was uncertain and their value as property was even more uncertain. The Emancipation Proclamation of President Lincoln certainly impaired the value of slaves as property in the border States of the South, while it did not tend to make them citizens. It made both their value and their status uncertain, and hence they cannot safely be accepted as fixed factors in any equation employed to ascertain the certain proportion of the public debt of Virginia which West Virginia should bear. They were without civil or political capacities in either State, and should not be reckoned as part of the population, on the basis of which the proper proportion of the debt due from West Virginia should be ascertained. The only fair, reasonable, and just bases on which such proportion can properly be established are total population of white citizens and total land area of the several States.

The amount of the public debt of Virginia as of January 1, 1861, is ascertained and is undisputed.

The evidences of that debt are shown to be bonds, issued by the Commonwealth, and which appear by the master's report to have been issued for different amounts and at different dates and with different periods of maturity. (See schedules annexed to paragraph I, "Joint Exhibit A-1," page 213, Record). The pamphlet filed with this brief shows the calculations by which the amount to be borne by West Virginia is ascertained on each of the several bases.

The bonds evidencing the public debt of Virginia prior to the first day of January, 1861, and surrendered by the holders thereof to the Commonwealth of Virginia, under the provisions of the several funding acts, were not canceled or extinguished as to the one-third of the amount thereof, estimated to be the equitable proportion of such debt to be borne by the State of West Virginia.

It has been repeatedly insisted by counsel for West Virginia, in their oral and printed arguments, that all of the

bonds that were surrendered by the holders under the funding acts were actually canceled and thus extinguished, and that both States were thereby released from liability by reason of those bonds.

By the act of March 30, 1871 (pages 14-17), it was provided in section 2:

> "The owners of any of the bonds * * * *may fund two-thirds of the amount of the same*, together with two-thirds of the interest due or to become due thereon * * * in coupon or registered bonds of this State."

And in section 3:

> "Upon the surrender of the old and the acceptance of the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owners or owner, for the other one-third of the amount due upon the bond * * * so surrendered, a certificate bearing the same date as the new bond, setting forth *the amount of the bond which is not funded*, as provided in the last preceding section, and that payment of such amount * * * will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia, * * * and *that the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees.*"

And in section 4:

> "*Each bond* * * * *to be funded* as herein provided, shall first be delivered to the second auditor, who shall calculate and determine the amount for which a bond shall be issued, and the amounts for which certificates shall be issued, under the second and third sections of this act, * * * The treasurer shall, by proper endorsement, written or stamped upon each bond * * * *so surrendered and delivered to him*, cancel the same and endorse thereon the date of such cancellation." * * *

So it appears that the cancellation was to be made only of the bonds that were to be funded, and not of so much of such bonds as were not to be funded, but were to be held by Virginia in trust for the holder or his assignee. By the act of March 28, 1879, section 6 (page 20), it was expressly provided:

> "The rules prescribed under the act approved March 30, 1871, in respect to preparing, signing, and issuing the new bonds and coupons, regulating the same, and in taking in, cancelling, and registering the old bonds shall be observed by the officers of the treasury in the execution of this act, * * * Whenever an obligation of the State shall be presented to the second auditor to be funded under this act, he shall note the fact and date on the proper register in his office, shall punch a hole through the name of the second auditor, signed or countersigned thereto, and shall issue his warrant upon the treasurer for the new obligations required. * * * But in cancelling and registering the bonds as above directed, in every bond and coupon surrendered under this act, holes shall be punched in one or more places and in such manner *as to render a new funding of the same impossible*, and every bond or coupon so cancelled shall be filed for reference."

In the 7th section it was provided:

> "The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the State of Virginia from all liability *on account of said certificates.*"

By none of these acts were the bonds surrendered by the holders for funding directed or authorized t obe canceled, except to the extent that such bonds could be funded. They could not be funded as to the one-third of their amount estimated to be due from West Virginia.

In his oral argument before this court (page 351), Mr. Carlisle said:

> "Now what was the obligation assumed by Virginia by the issue of these certificates? Was it to pay money? None of the counsel has said to the court that if Virginia should fail to provide for this additional one-third by a settlement with West Virginia, that the holders of these certificates could come back upon the State of Virginia and demand their money. That has not been suggested. What the holder could do, perhaps, would be to demand his bond, but that would be of no value to him, because the bond has been cancelled, and I will also show before I get through that nearly all of the holders of these certificates issued under the act of 1871 have deposited their certificates with the commission under a contract which releases Virginia."

It is certainly true that no suggestion has been made by counsel for Virginia that the certificates issued by her were intended to, or that they did, create or evidence any indebtedness on her part to the holders of them. And hence it was that in the acts and on the face of the certificates was the admonition, distinctly given, that the "acceptance of the certificate for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the State of Virginia from all liability on *account of this certificate.*"

And on each certificate it was stated that it was issued "without recourse upon this Commonwealth."

It was to expressly declare that Virginia, being already liable on the bonds *held by her in trust for the owner*, would not be made liable for the same debt by virtue of these certificates, which were issued as mere memoranda of the trust on which Virginia held the bonds as to the unfunded one-third of their several amounts.

The bondholders did surrender their bonds to the State of Virginia, the debtor and obligor. Such surrender, unexplained or unqualified, would tend to prove the satisfaction

and extinguishment of the bonds as evidences of indebtedness. But Virginia was satisfying them only as to two-thirds of their amounts. The other one-third was not paid, satisfied, or discharged, but was kept alive as a still subsisting obligation. Hence the agreement, that all the bonds so surrendered should be held by Virginia as satisfied and extinguished as to the two-thirds paid by Virginia by the substitution of her new bonds, but as held in trust by her for the creditors to the extent of the remaining one-third, and *as to this one-third the bonds were not canceled*, and this the acts of the legislature and the certificates themselves fully attest.

The Commonwealth of Virginia has never been discharged from liability on the bonds issued by her prior to January 1, 1861, *except as to the extent of the two-thirds of the amount thereof, for which amount the holders of the old bonds surrendered them as to such two-thirds and received in lieu thereof new bonds of the Commonwealth.*

In the brief filed on behalf of West Virginia in support of the demurrer to the bill, and repeatedly thereafter, it has been insisted that—

> "these certificates were accepted by the creditors without recourse upon Virginia, in payment or settlement of this one-third of her debt, thereby releasing Virginia from the payment of the one-third of her old, original debt" (1st May's Comp., page 121).

Mr. Carlisle, in the brief signed by him alone (1st May's Comp., page 383), makes the same assertion, but with some qualification. He says:

> "We think it clear that Virginia has been released by the provisions contained in the various acts, by the surrender and cancellation of the bonds, by the acceptance of the certificates under the acts, and by the contracts entered into between the creditors and the commissions; but, even if there had been no for-

> mal or voluntary release, the State has repeatedly declared in the funding acts and in the joint resolution of March 6, 1894, and the act of March 6, 1900, under which this act is brought, that she is not liable for the unfunded one-third of the debt."

A brief notice of the several funding acts here relied on will serve to dispel the notion that they provided for, or even contemplated, release of Virginia from her obligation of the unfunded one-third of her bonded debt.

The act of March 30, 1871, is set out in full (May's Comp., pages 14-17), and it contains nothing to warrant the assertion. Indeed, counsel for West Virginia, in their first brief, expressly say:

> "Under the terms of this statute Virginia still remained liable for the payment of her entire debt, including the one-third unfunded, for which deferred certificates were to be issued, payable upon a final settlement between Virginia and West Virginia" (May's Comp., page 112).

The next act in course was that of March 28, 1879 (*Ibid.*, pages 17-22). It does provide in section 7, page 21:

> "The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the State of Virginia *from all liability on account of this certificate.*"

Not from all liability on account of her *bond,* which was held by Virginia, unfunded and uncanceled, in trust for the depositor as to the one-third thereof, but from liability on account of this *certificate.* The reason is plain. The State acknowledged her liability on her bond, but the bond had been surrendered into her hands by the holder of it, because she had paid two-thirds of the full amount of it. She had not paid the remaining one-third of it, because she looked to West Virginia to provide for that, but the holder

entrusted her with the bond on her assurance that she would hold it in trust for him. Being liable on the bond, she did not intend that she should be also liable on the certificate, which merely represented the bond. She was not willing to have outstanding two written, negotiable evidences of the same indebtedness. Hence the stipulation that she should not be held liable "on account of said certificate."

The third act was that of February 14, 1882 (*Ibid.*, pages 22-31). The form of the certificate prescribed by this act provided on its face (page 30) as follows:

> "The Commonwealth of Virginia has this day discharged her equitable share of the bond for —— dollars, held by —— ——, dated the — day of ——, and numbered —, leaving a balance of —— dollars, with interest from ——, to be accounted for by the State of West Virginia, *without recourse upon this Commonwealth.*"

Her "equitable share of the bond" she had estimated at two-thirds of its full amount. The remaining one-third she estimated to be the equitable share of West Virginia, but she knew that she was legally liable for the entire bond, and that this certificate was but an additional evidence of so much of that liability, and for that reason she provided that she should not be liable on the certificate.

The next act was that of February 20, 1892 (*Ibid.*, pages 32-40). The form of the certificate prescribed by this act appears on page 37, and it concludes, "without recourse upon this Commonwealth."

So it appears that by none of the acts of the Virginia legislature providing for the ascertainment of Virginia's share of the public debt was it stipulated or declared that Virginia should be released from her legal liability for the one-third of the debt evidenced by the West Virginia certificates.

West Virginia's Plan.

On the part of West Virginia, it is insisted that the two States have, by a special agreement or compact entered into between them, provided that the method for ascertaining West Virginia's proportion of the public debt, proposed in the ninth section of the ordinance passed on the 20th day of August, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," is the only method proper to be now employed.

That ninth section is as follows, viz.:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of the debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."

In the answer filed by West Virginia in this case, it is averred in paragraph XX (May's Comp., page 21):

> "After the promulgation of the ordinance of the convention the people of Virginia, as well those residing in that part of the territory to be converted into a new State as those residing in the other parts of the Commonwealth of Virginia, which constitutes the present territory of that State, were fully advised as to the provisions of the said ordinance, defining the manner in which the equitable proportion of said debt was to be ascertained, and when the con-

> stitution of West Virginia was framed and adopted in the year 1861, the said section nine was in full force, and both the Commonwealth of Virginia and the citizens residing in that portion thereof out of which the proposed new State was to be formed were satisfied with the methods therein provided for ascertaining respondent's equitable proportion of the said public debt, and the constitution was framed and adopted, and West Virginia's equitable proportion of said debt was assumed on the basis of said ordinance and not otherwise."

In his argument before this court, Mr. Carlisle said (May's Comp., page 290):

> "Our argument was that Virginia had made a proposition in the 9th section of the ordinance, and tendered it to West Virginia; that when West Virginia's convention assembled, which was the first time that State could speak on the subject, it accepted the proposition, with the addition to it, that the legislature of West Virginia should be the tribunal to ascertain her just proportion of the debt, and that Virginia, subsequently, by the passage of the act asking for the admission of West Virginia into the Union, under that constitution, had agreed to this additional clause which the West Virginia convention had inserted in it. So, we argued, that the compact consisted not only of the 9th section of the ordinance, but of the whole of the eighth section of the West Virginia constitution, including that part of it, of course, which provided that the legislature should ascertain her just proportion."

Here then is the alleged "compact" entered into between the two States of Virginia and West Virginia, and here are the grounds upon which it is claimed that such compact was actually entered into, and on which alone its existence is maintained.

Let these grounds be examined.

There was a convention in Wheeling, in June, 1861, of the people of that part of Virginia which at present consti-

tutes the State of West Virginia, and that convention did, in August of that year, adopt the ordinance entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," and the ninth section of that ordinance was as above recited, and that convention did adjourn *sine die*.

There was another convention called to frame a constitution for the proposed new State of West Virginia, and that convention did frame such constitution. But it is altogether inaccurate and misleading to speak of this second convention as though it were another and distinct people there assembled, to say, "When West Virginia's convention assembled, which was the first time that State could speak on the subject;" for the fact cannot be disguised that the second convention represented the same people as the first, and none other. The same counties were represented in both conventions, and these were the same counties that were represented in the legislature of the Restored State of Virginia, and then later of the State of West Virginia. The fallacy that pervades and infects the entire argument lies in the assumption that two distinct bodies of people were concerned here and were contracting with each other.

In the written opinion given by Attorney General Edward Bates to President Lincoln, as to the action he should take on the act of Congress admitting West Virginia into the Union, he said:

> "And the legislature which pretends to give the consent of Virginia to her own dismemberment is (I am credibly informed) composed chiefly, if not entirely, of men who represent the forty-eight counties which constitute the new State of West Virginia. The act of consent is less in the nature of a law than of a contract. It is a grant of power; an agreement to be divided. And who made the agreement? The representatives of the forty-eight counties with themselves. Is that fair dealing? Is that honest legislation? Is that a legitimate exercise of a constitutional power by the legislature of Virginia? It seems to

> me that it is a mere abuse, nothing less than an attempted secession, hardly valid under the flimsy forms of law."

The tenth section of the "ordinance to provide for the erection of a new State," &c., provided that—

> "when the General Assembly shall give its consent to the formation of the new State, it shall forward to the Congress of the United States such consent, together with an 'official copy' of such constitution, with the request that the new State may be admitted into the Union of States."

It did not provide that a copy of the "ordinance" should be forwarded to Congress, and there is nothing in this entire record to sustain the assertion that Congress ever saw or knew of that ordinance or of its provisions.

The constitution framed by the November convention for the new State of West Virginia provided, in the eighth section of its eighth article, as follows, viz.:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

On the 18th of May, 1862, the legislature of the Restored State of Virginia gave its consent to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of * * *; then follows the names of the forty-eight counties forming West Virginia,

> "according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia, and the schedule thereto annexed,

proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

Provision is further made in this act for the inclusion of the counties of Berkeley and Jefferson and Frederick whenever the voters of said counties shall ratify and assent to the constitution.

The Congress of the United States, by act approved December 31, 1862, in which the names of the forty-eight counties were recited, did admit the State of West Virginia into the Union.

These were the same counties, and none others, that constituted the Restored State of West Virginia.

The argument that the convention which framed the constitution for West Virginia was bound by the provisions of the ordinance adopted by the preceding convention, and that the requirement of the eighth article of the constitution, that "the legislature shall ascertain the same as soon as may be practicable," meant that the legislature should ascertain the equitable proportion of the public debt to be borne by West Virginia, according to the method prescribed by the ninth section of the ordinance, finds no support from anything disclosed in this record.

That ordinance, as shown by its title, was to provide for the formation of the new State. All of its sections, except the ninth, were directed toward that end. The State was formed when its constitution was framed and adopted by the people. The ordinance then became *functus officio*, and ceased to have any operation. The ninth section, as said by Mr. Carlisle in his argument, "was a proposition made by Virginia, and tendered to West Virginia." If this be true, then West Virginia's day of grace was when she was assembled in convention in November, 1861—three months after the proposition was tendered: then, and only then, while she was framing her constitution could she have signified her acceptance of the proposition by embodying it in her constitution. But she did not embody it. She embodied

something altogether different, and made no reference to the ninth section of the ordinance. But the view now urged on behalf of the defendant State is, that while her constitution does not expressly refer to the ordinance, yet when it directed that the legislature should ascertain the amount due from West Virginia it meant that the legislature should ascertain such proportion by the method proposed by the ninth section of the ordinance, which is merely assuming the very thing that West Virginia has undertaken to prove.

The entire defense here made by West Virginia to the bill rests upon the ninth section of the ordinance—that the fantastic plan there proposed for ascertaining the "equitable proportion of the public debt" which the constitution prescribed should be assumed by West Virginia—was, by solemn compact between the Commonwealth of Virginia of the one part and the State of West Virginia of the other part, adopted and agreed upon as the method to be employed.

Few men in the State of West Virginia had more intimate and thorough knowledge of the history of those times than the Hon. Charles James Faulkner, a lifelong resident of Berkeley county, a Representative in Congress from that district prior to the Civil War, and United States Minister at the Court of France at the breaking out of that war. Mr. Faulkner had been leading counsel for the State of West Virginia in the case of Virginia *vs.* West Virginia, reported in Eleventh of Wallace, which involved the question of the status of Berkeley and Jefferson counties, and to his ability and skill must be allowed the credit of that victory. Because of his familiarity with the whole history of the evolution of West Virginia, his opinion was asked as to the effect that should be allowed to the ninth section of the ordinance. His opinion was given in 1884, in the course of which he said:

> "After a careful examination of the case of Virginia *vs.* West Virginia, I cannot perceive that the court attaches any peculiar legal efficacy to the ordinance of August, 1861. It is true it referred to that

> ordinance historically, but only for the purpose of showing that even at that early period of our history the counties of Berkeley and Jefferson were contemplated as possible additions to the State of West Virginia. My reasons for supposing that the court might not regard the ordinance of 1861 as prescribing a binding rule for settlement of the debt are, that by the subsequent constitution, framed and adopted by the people of West Virginia, this basis of settlement is abandoned, and we are there made to assume an equitable proportion of the public debt of Virginia prior to January 1st, 1861, and the legislature is directed to ascertain the same as soon as may be practicable. Virginia, in giving her consent to the formation of a new State in May, 1862, expressly does so upon the provisions set forth in the constitution of West Virginia. Upon these terms we were admitted by Congress as a State of the Union, and the constitution of 1863, thus ratified by the two States and by Congress, would be more likely to be taken as the basis of the contract than the effete ordinance of August, 1861."

And the view here expressed by this great lawyer, that the constitution framed and adopted by the people of West Virginia altogether superseded and supplanted the propositions of the August convention, finds strong support in the decision of this court in the case of Strauder *vs.* Graham, reported in the 10th of Howard, where it was said:

> "The State comes in under the provisions of its own constitution; you cannot look outside of it; you cannot look behind it. This is the final, ultimate expression of its civil and political rights and powers."

It is denied on the part of Virginia that the method proposed by the ninth section of the ordinance adopted by the convention on the 20th of August, 1861, for ascertaining West Virginia's just proportion of the public debt of Virginia, formed part of any compact or agreement whatever between the two States, or of the consent given by Virginia

or that such method was proposed as a condition or as a measure upon the acceptance or rejection of which the formation of the new State in anywise depended.

It does not purport to have been proposed as a condition or term of an agreement between the two States. The form and structure of the section in which it appears precludes the belief that it was anything more than a suggestion or recommendation offered to the convention which was soon thereafter to assemble. It is wanting in all the characteristic features of a solemn condition or limitation prescribed by a State as a term upon the acceptance of which alone she will consent to a cession of a portion of her territory. Many compacts between States of this Union have been before this court, but all of these have appeared clothed in a form and expressed in language that left no room for doubt as to their significance and purpose.

The compact between Virginia and Maryland in 1785, entered into at Mt. Vernon, was clear, formal, and unambiguous, and stated in a series of distinct paragraphs, each embodying a distinct term of the agreement.

City of Georgetown *vs.* Alexandria Canal Co., 1 Peters, 94.

The compact between South Carolina and Georgia of April 12, 1787, was expressed in solemn, formal style in numbered articles.

South Carolina *vs.* Georgia, 93 U. S., 4.

And so in the compacts which received consideration by this court in the cases of—

Poole *vs.* Flegar, 3 Wheat., 212.
Burton, lessee, *vs.* Williams, 3 Wheat., 529.
Green *vs.* Biddle, 8 Wheat., 1.

The *subject-matter* of the ninth section of the ordinance—that is, the mere plan or method by which an amount should be ascertained—cannot be made the subject of a compact or

a condition upon which an existing State consents to a cession of part of her territory for the erection of a new State.

The subject-matter of such compacts cannot be allowed to embrace any other subjects than the extent of the territory so ceded and the usual and ordinary incidents appurtenant to such territory.

All other matters fall within the exclusive power and control of the new State so formed.

In none of the compacts made between States does it appear that the parent State has ever sought or been allowed to impose on the new State any such conditions, limitations, or burdens as were not immediately connected with the territory ceded for the new State.

In Virginia *vs.* Tennessee, 148 U. S., 520, and in Wharton *vs.* Wise, 159 U. S., 170, this court, referring to section 10 of article 1 of the constitution, prohibiting any State from entering into any agreement or compact with another State, quote from Story, Comm., section 2403, as follows:

> "Compacts and agreements might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort of States bordering on each other."

The territory ceded, its boundaries, the rights to and in water courses flowing through and by it, the rights, titles, and interests therein acquired from the parent State, these and other kindred matters may form the subject of a compact between States, but other matters affecting the domestic concerns of the new State, such as the basis and the rate of taxes to be laid therein, its police policy and regulations, its powers in the contracting and payment of its public debts, all these, and others like them, are beyond the power of the parent State to control or in anywise affect, and are exclusively within the control of the sovereign State so created.

The public debts of a State are burdens resting upon it,

for the discharge of which the revenues of the State arising from taxation laid upon its lands are justly applicable, and where a State burdened with a large public debt is divided into two or more States it may very well be deemed proper and provision may be made by conditions annexed to the cession or by compact between the parent State and each of the proposed new States that such new States should assume and bear their respective proportions of such public debt. The new States may thus be required to take their respective portion of the territory ceded, with the burdens resting upon such portions.

All other matters connected with the discharge of the liabilities thus assumed must be left to the new State so assuming them. Any other requirement would indeed be, what Mr. Justice Johnson, in Green *vs.* Biddle, 8 Wheat., 99, characterized as "cutting deep indeed into the sovereign powers of the State."

Virginia might with great propriety have imposed the condition to the erection of the new State within her territory that such new State should take upon herself a just proportion of the public debt. She knew that West Virginia would be liable—under the doctrine of public or international law—for her just proportion, but what concern was it of Virginia's how West Virginia should ascertain the amount of such liability, or whether she did so by her legislature or her Governor or her treasurer or by the method prescribed by the ninth section of the ordinance? Virginia knew, as any creditor would know, that if the amount so ascertained was not a "just proportion" it would not be accepted as such. Why should Virginia, in convention assembled, insist that the new State, for whose creation she was providing, should bear a just and reasonable part of a common debt, and then further insist that such part should be ascertained only by the new State, through her legislature, and by a method which is admitted by counsel and found by the master in this case to have no relation whatever

to the amount of that debt? This inquiry serves to bring to the light the grave fact, not adverted to heretofore, that the State of Virginia, which adopted this ordinance and gave its consent to the creation of the new State, consisted only of the same territory and the same people who were to constitute the State of West Virginia.

Less than one-third of the territory and less than one-third of the population of the Commonwealth of Virginia were participating or represented in the conventions and legislatures that were engaged in the creation of this new State.

To be sure, they were recognized by the political departments of the Federal Government as being the Commonwealth of Virginia, and it is beyond question that the political product of their labors—the new State of West Virginia—was invested with sovereignty and autonomy that are indestructible and must endure. But will that panoply serve, in this judicial investigation, to shield this defendant State from the scrutiny that must result in the discovery that the two alleged contracting parties—the one submitting a proposition and the other accepting it—were in truth and in fact but one person and the same person throughout? The counties that composed the Restored State of Virginia, and which were represented in these conventions and legislatures, were the same counties and none other that composed the State of West Virginia and were represented in her councils.

Here we find the explanation of the curious feature that the State of Virginia in giving her consent to the erection of West Virginia imposed it as a condition of that consent that West Vrginia should be the arbitrator to ascertain the amount of her "just proportion," and that she ascertain it by a method which Virginia then knew, and which we all know now, would bring Virginia in debt to West Virginia, or else would find a very small balance the other way.

The public debt was evidenced by the bonds of Virginia

to the amount of about $33,000,000. These were outstanding in the hands of holders for value. To the extent that West Virginia was released from her liability on these bonds would the liability of Virginia be increased. Why, then, should Virginia desire to release West Virginia from her just proportion of this liability? Because the Virginia that was thus seeking to release West Virginia would in a short time cease to exist; she would be merged into and become herself West Virginia, and so, when the bondholder presented himself and demanded payment of the bond of Virginia held by him, the only Virginia remaining to make response to his demand would be the present Commonwealth of Virginia, and when she should call on West Virginia to contribute her proper proportion of this common indebtedness she would be met by the reply that has greeted us here, "Virginia has entered into a compact with West Virginia by which West Virginia has been released from all liability on these bonds."

No Compact Was Ever Entered into Between Virginia and West Virginia.

The compact, as West Virginia contends, was formed by a proposition made by Virginia to West Virginia by and through the ninth section of the Wheeling ordinance. This proposition, as contended, was accepted by West Virginia by and through the eighth section of the eighth article of her constitution, "with the addition to it that the legislature of West Virginia should be the tribunal to ascertain her just proportion of the debt, and that Virginia subsequently, by the passage of the act asking for the admission of West Virginia into the Union under that constitution, had agreed to this additional clause which the West Virginia convention had inserted in it." (Carlisle's argument, 1 May's Comp., p. 290.)

Conceding, for the sake of the argument, that the plan for ascertaining West Virginia's just proportion of the public

debt was a proposition submitted by Virginia for West Virginia's acceptance, *did West Virginia ever accept it as it was offered?* It is admitted that she did not; but it is said that she did accept it *with an additional term added.* It is insisted that Virginia subsequently acceded to this additional term by the act of May 13, 1862.

In Minneapolis, &c., Railway Co. *vs.* Columbia Rolling Mill, 119 U. S., 149, this court said:

> "As no contract is complete without the mutual assent of both parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party. The one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation unless the party who made the original offer renews it or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it."

To the same effect is the case of Compania Bilbania *vs.* Spanish American Co., 149 U. S., 497, and Virginia Hot Springs Co. *vs.* Harrison, 93 Virginia, 569.

The text-writers concur in the doctrine thus announced. In 1 Chitty on Contracts (11 Amer. ed.), page 15:

> "Where an agreement is sought to be established by letters, such letters will not constitute an agreement unless the answer be a simple acceptance of the proposal without the introduction of any new term."

In Anson on Contracts (2 Amer. ed.), page 22, it is said:

> "Acceptance must be absolute; unless this is so the intention expressed by one of the parties is either doubtful in itself or different from the other. If A

> offers to X to do a definite thing, and X accepts conditionally, or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is, in effect, a counter-proposal."

The ninth section of the Wheeling ordinance proposed that

> "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof and a just proportion of the ordinary expenses of the State government, since any part of the debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the new State during the same period."

That was the proposal made by Virginia.

The eighth section of the eighth article of the constitution of West Virginia provided:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

That was West Virginia's acceptance of the proposal. Not only was it not an "absolute acceptance" of the proposal as made, but it was materially and essentially different in each of its terms.

It provided for an "equitable" instead of a "just" proportion of the debt. It ignores the plan of ascertainment by the deduction of payments from receipts. It provides that the legislature of West Virginia shall be the sole arbiter to ascertain and determine the amount that West Virginia

shall assume. It provides that the debt to be assumed by West Virginia shall not be liquidated for thirty-four years.

Was there an agreement of minds of the two parties as to the terms of the alleged compact? Manifestly not, as the matter stood upon the proposal and the alleged acceptance.

But it is said that subsequently Virginia, "by the act asking for the admission of Virginia into the Union under that constitution, had agreed to this additional clause which the West Virginia convention had inserted in it."

By "this additional clause" is meant the clause making the West Virginia legislature the sole arbiter in the matter. But even that does not meet the other additional terms inserted by the West Virginia convention.

Now look at the act referred to (1 May's Comp., p. 438). It gives the consent of Virginia to the erection of the new State within the jurisdiction of Virginia.

If the legislature had had before it the plan proposed by the ordinance and that prescribed by the constitution, and had intended to exclude the conclusion that it approved of and adopted the terms of the ordinance, it could not have employed more apt and adequate terms. It makes no reference whatever to the ordinance, nor does it in anywise refer to the public debt or to the proportion of it to be borne by West Virginia, but it gives the consent of Virginia to the erection of the new State "according to the boundaries and under the provisions set forth in the constitution for the State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

If the plan proposed by the Wheeling ordinance was but a proposition made by the June convention of Virginia to the State of West Virginia, then West Virginia, assembled in convention on the 26th of November, 1861, should have either accepted or rejected the proposition thus made. It did neither; it simply ignored it altogether. Indeed, from all that appears here, the convention of West Virginia had no notice or knowledge of the proposition so made, for it no-

where refers to it. It makes provision for the same subject-matter, but that provision, as we have seen, is altogether different from the proposition made in the ordinance.

By what rule of construction can it be contended that when the West Virginia convention provided in the constitution it was framing that "the legislature shall ascertain the same as soon as may be practicable" meant that the legislature should ascertain the same in accordance with the plan proposed by the ordinance framed by the Virginia convention? Even if it be true that an act or ordinance passed by one State may be construed *in pari materia* with an act or ordinance passed by another State, which we do not admit, construing the ordinance of the Virginia convention with the constitutional provision of the West Virginia convention must result only in the conviction that the latter body, after considering the provision proposed by the former, found it absurd, inequitable, and improper, and rejected it.

The method proposed by the ninth section of the Wheeling ordinance should not be accepted as the proper plan for ascertaining West Virginia's just proportion of the public debt of Virginia for which she is liable.

1. The method proposed has no relation whatever to the public debt, and it cannot be applied so as to ascertain any proportion of that debt.

In his response to the third paragraph of the decree of reference, the master, in his report, says (page 39):

> "The Wheeling ordinance is not predicated upon the *amount* of the public debt. Upon the assumption that West Virginia would be liable for 'a just proportion of the public debt' in case of separation, the ordinance prescribes an arbitrary method by which that 'just proportion' shall be ascertained, &c."

And this view of the master has strong support from the admissions of counsel for West Virginia at the bar of this court. Mr. Carlisle, in his argument, said:

> "I say that the method of settlement provided for in the ninth section of the ordinance has no relation to the amount of the public debt of Virginia existing on the first day of January, 1861. In other words, it is wholly unnecessary, in making a settlement under the terms of that ordinance, to ascertain what the amount of Virginia's public debt was on the first day of January, 1861."

Upon this declaration Mr. Justice White then said from the bench:

> "Then, if that provision for settlement has no relation, and does not concern itself at all with a just proportion of the public debt, which you say is the case, is there not an absolute incompatibility of the constitution with the provision of the ordinance?" (2 May's Compilation, p. 281).

Mr. Carlisle had elsewhere said:

> "An examination of the Wheeling ordinance shows that the amount of the Virginia debt, as it existed prior to January 1st, 1861, is not a factor to be taken into consideration in ascertainng West Virginia's just proportion" (1 May's Comp., p. 190).

And further (page 360) he said:

> "The amount of the debt and the purpose for which it was created have nothing whatever to do with the settlement under the terms of the ordinance. They are not factors in the problem submitted under that agreement."

And Senator Spooner said (2 May's Comp., page 253):

> "Counsel are very accurate when they say that this ordinance does not deal in terms with the debt; that is true; it is no assumption of any part of the debt, as such."

True, the ninth section of the ordinance does declare that "the new State *shall* take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," and it does purport to prescribe a method by which that "just proportion" shall be *ascertained*.

Yet here we have the iterated solemn declarations of the counsel for West Virginia that this ordinance "is no assumption of any part of the debt," and that the "amount of the debt and the purpose for which it was created are not factors in the problem submitted under that agreement" The amount, then, that might be ascertained by the method prescribed by the ordinance would be no *proportion of the public debt* at all. It would be only the difference between the amount expended by legislative appropriations and the amount paid into the treasury from the counties forming West Virginia through a period of about forty years.

But, assuming for the sake of argument, that the proposition had been made by Virginia, and had been accepted by West Virginia, that the method prescribed by the ninth section of the ordinance should be the method for ascertaining West Virginia's just proportion of the debt, what does an examination of that method disclose? We have seen that the master has reported, and that counsel for West Virginia have insisted, that by that method no proportion of the debt could be ascertained; that there was no relation between that method and the amount of the debt.

In the case of Hume *vs.* United States, 132 U. S., 406, a contract between the two parties was held to be "extortionate and unconscionable on its face," and Fuller, C. J., speaking for the court, referred to the opinion of Lord Hardwicke in Chesterfield *vs.* Janssen, in which he said:

> "Fraud may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion would make on the one hand, and as no honest and fair man would accept on the other," &c.

I invite the application of this test to the ninth section of the Wheeling ordinance.

Would the Commonwealth of Virginia, knowing as she did that the State of West Virginia was liable for a just and reasonable proportion of her public debt, have agreed that such proportion should be ascertained by this method, and that the legislature of West Virginia should be the tribunal to ascertain it?

In the answer of West Virginia it is distinctly averred (page 20, sec. XX) that—

> "the finance committee of one branch of her legislative body had ascertained and reported that there was no liability upon her part to the Commonwealth of Virginia, on account of the said public debt under the ordinance of the Wheeling convention, and this respondent now denies that she owes, or will owe any sum whatever to the State of Virginia, upon a settlement made in the mode provided in said ordinance."

And this answer is sworn to by the Governor of West Virginia. The Governor could conscientiously swear to that averment, because he knew that the "mode provided" had been intelligently provided to produce that result, and, in the hands of the West Virginia legislature, it had produced the result originally contemplated.

The master in this case has succeeded by the application of certain fixed principles, which have resulted in the rejection of many items claimed by West Virginia, and the allowance of others to which that State objected, in obtaining a very different result from that reached by the West Virginia legislature, and in so doing he has disappointed the expectations of the framers of the method of the ordinance; but the result reached by the master has no relation to the public debt of Virginia, or to West Virginia's liability for a proper proportion thereof, because the method itself had no such relation, and the pretense that the two States had by

compact agreed upon that method as the mode of ascertainment is found to be wholly without support.

We have endeavored to show heretofore that the acts of the conventions and legislatures, relied on as constituting a "compact" between Virginia and West Virginia, do not, on any reasonable principles of construction, suffice to form such compact; that they are altogether inadequate in their forms and character to be construed as intended to constitute a solemn compact between sovereign States, and that the mere method to be employed in ascertaining the amount for which a State is liable cannot be made the subject-matter of such a compact.

We now ask that the transaction be considered in the light of the alleged compact itself, its terms and provisions, its efficiency for the object had in view, its reasonableness and its fairness, the parties to it, their known relation to each other, and their evident object in contriving the method proposed by the Wheeling ordinance.

1. It is found by the master, and is admitted by counsel for West Virginia, that the method proposed is not adapted to ascertain West Virginia's just proportion of the public debt. While the ordinance provides that West Virginia shall take upon herself a just proportion, "to be ascertained" by this method, that it is now admitted that this method cannot accomplish that result. It is immaterial to the present purpose how or why it was adopted as the method. It is enough to know that it is altogether inadequate, and hence cannot be employed to ascertain the result sought.

How, then, can this court be asked to accept as the proper plan for ascertaining the amount of West Virginia's just proportion of this debt a method now known to be improper and ineffectual?

2. The method proposed, even if agreed on by the two States, should not be accepted and applied by this court, because it discloses on its face not only its inefficiency, but

its unreasonableness and its unfairness. The professed object of the two States was to provide a method by which a just proportion of the amount of a known public debt could be ascertained. When that method is examined it is found to have no relation whatever to that amount, but to consist only of the difference between the amounts received and the amounts expended by certain counties within a certain period. But when that difference is ascertained by that method it affords no aid toward ascertaining the proportion of the public debt proper to be borne by West Virginia. It is not pretended that the two States ever agreed that the amount so ascertained should be accepted *in lieu* of a just proportion, or that it should be the measure of such just proportion. The only "compact" claimed to have been made is that West Virginia should take up herself a just proportion of the public debt, to be ascertained in the manner agreed. If the two States through error, mistake, or ignorance agreed upon a rule of measurement that is now found to be impracticable, they cannot ask this court to apply that impracticable rule. If, on the other hand, the two States agreed upon this rule, knowing at the time it was impracticable, that it could not ascertain the result sought, then their conduct is open to scrutiny and they must explain why they agreed on a rule known by them to be unfit. And this inquiry must lead to an investigation as to the parties to such agreement.

3. The parties to the agreement appear to be the State of Virginia and the State of West Virginia.

But the method of asceertainment appears to have been contrived and proposed by Virginia, and she was the obligor in the bonds that constituted the debt. In providing for the erection of a new State from a part of her territory, and thus diminishing her sources of revenue by the cession of nearly one-third of her territory and her population, a sane regard for her own interests and the interests of her bondholding creditors should have prompted Virginia to require

of the proposed new State some recognition of her liability for a just proportion of that public debt and some provision for the discharge thereafter of such liability. She did require that the new State should take upon itself a just proportion of the public debt, but she further proposed that such just proportion should be ascertained by the method indicated.

What fair and reasonable construction should be placed upon this conduct? Virginia must be held to have had intelligent regard to her own interests, yet she was not only ceding near one-third of her territory, but was also releasing West Virginia from her liability for her proportion of the debt. How can these be reconciled? Plainly enough. There were two Virginias. One had preceded the formation of the Union; the other was a reorganization of the government of the former, effected on June 13, 1861, in the city of Wheeling. It took upon itself the name and sought to perform the functions of the Commonwealth of Virginia, and it was recognized by the Federal Government as being the true and real Commonwealth of Virginia. It sent Senators and Representatives to the Congress of the United States, and received from the United States money that belonged to the Commonwealth of Virginia. The reason of the existence of this Restored State was the conversion of the territory occupied by it and that of the population of such territory into a new State, which was to be admitted into the Union as an independent sovereign State. Such new State could not be erected within the territory and jurisdiction of Virginia without the consent of Virginia, and the State of Virginia, whose capital was in the city of Richmond, it was reasonably feared would not give such consent. Hence the necessity of forming another Virginia whose consent could be obtained. So the Restored State of Virginia was formed of forty or more counties of the old Commonwealth, and two months later it provided by ordinance for the erection of the new State, which was composed of those same coun-

ties, and none other. The Restored State of Virginia became the State of West Virginia. Its territory and its population became the territory and population of West Virginia, and all that remained to that evanescent State was its name and its Governor. The Governor was, to be sure, a resident of the new State of West Virginia, but his sense of official duty required that he should retain his office and his government, although there remained to him nothing to govern. He removed the seat of his government to Alexandria, and later, after the evacuation of the city of Richmond, he removed to that city and held himself out as Governor.

On March 2, 1867, Congress, by an "act to provide for the more efficient government of the rebel States" (14 St., p. 428), declared that—

> "Whereas no legal governments or adequate protection for life and property now exist in the rebel States of Virginia, etc., * * * and
>
> "Whereas it is necessary that peace and good order should be enforced in said States until loyal, republican governments can be legally established, &c.,"

and the entire government of the Restored State of Virginia was swept out of existence, and a major-general of the U. S. Army reigned in its stead. So we can now perceive why it was that the two States of Virginia and West Virginia might very intelligently have entered into such a compact. The Restored State knew that her days were numbered and that the only function of her sovereign existence was to provide for the transformation of herself into the new State of West Virginia. She took care to provide a method for ascertaining West Virginia's proportion of the public debt, which would secure West Virginia from all but a nominal liability, and it concerned her not at all that the burden of the entire debt should fall upon the old Commonwealth of Virginia when she emerged from the horrors of war. Now we can all plainly see that while there appeared to be two parties enter-

ing into a solemn compact, these two were but one and the same party at different stages of its political existence.

The convention that framed the constitution for the proposed new State did not regard itself as bound by any suggestions or requirements made by the Wheeling ordinance, and it either ignored or repudiated the suggestions made as to the name of the proposed State, and as to the method of determining the proportion of the public debt of Virginia for which West Virginia should be held liable.

The Wheeling ordinance, as its title declared, was framed and passed only "to provide for the formation of a new State out of a portion of the territory of this State."

It was not intended and it did not purport to do anything more than make appropriate provision for the organization of such new State, by calling a convention which should be empowered to frame a constitution for the new State, and to do anything else that was within the power of a constitutional convention.

The convention had been called under the provisions of the ordinance, and that instrument had now performed all its functions and ceased to be any longer operative and binding.

The first section of the ordinance had provided that—

> "The people of Virginia, by their delegates in convention assembled, do ordain that a new State, *to be called the State of Kanawha*, be formed and erected out of the territory included within the following-described boundary," &c.

Article 1, section 1, of the constitution framed by the convention assembled under that ordinance, provided:

> "1. The State of *West Virginia* shall be and remain one of the United States of America."

In the very important feature of the name of the new State, the first act of the convention was to disregard altogether the requirement of the ordinance that the new State should be called "Kanawha," and to fix upon it the name of West Virginia.

So, as has been seen, in the matter of providing the method for ascertaining the proportion of the public debt to be borne by the new State, the convention disregarded the suggestion or requirement of the ordinance and made a wholly different provision.

The convention called to frame the constitution for the new State was elected, and it assembled and entered upon the discharge of its duties, in obedience and pursuant to the mandate of the ordinance, but when it assembled and had organized it recognized the fact that it represented the sovereign powers of the people who had called it together and had clothed it with full authority to exercise those powers. The people it represented had imposed no restrictions or limitations upon it, and the preceding convention, which had framed and passed the ordinance under which it had been called, was without authority to impose such restrictions or to prescribe to it the duties it was to perform. If that convention had the power to dictate to it the provisions of the constitution it was called to frame—even the single provision as to the method by which the amount of the public debt to be borne by the new State should be ascertained—then, plainly, it was not what it purported to be, representing the sovereign powers of the people who were thus "in convention assembled," but it was merely empowered to record the prescripts and mandates of the former convention.

It doubtless had before it the ordinance under which it had been called into being, and was fully advised of all that the ordinance contained, and was further advised as to its obligations and duties under the ordinance. It did not regard itself bound by those obligations and duties to adopt

the name of the State prescribed by the ordinance, and, doubtless, for the same reasons disregarded the suggestion made in the ordinance as to the method proposed for ascertaining the amount of the liability of the State for the public debt.

The argument urged on behalf of West Virginia in this case has been that when that State accepted the constitution framed for her by the people of Virginia, then within the territory of the proposed new State, she accepted it under the ordinance, and thereby assented to each and all of the provisions of that ordinance, and among these the provisions embraced in the ninth section, prescribing the method for ascertaining the amount of West Virginia's liability for the public debt of the Commonwealth of Virginia.

That argument, however, assumes as a postulate the very thing to be proven. Where and how does it appear that the people of West Virginia, when they ratified and adopted the constitution that had been framed for them, "assented to each and all of the provisions of the ordinance" under which the convention had been assembled?

They certainly did not assent to the provision as to the name by which the proposed State should be called, and they assented to the provision made by the convention, and not to that made by the ordinance, for the ascertainment of the amount of the liability of the new State.

But, it is insisted, the provision of the constitution referred to and adopted as an implied, although unexpressed term, the method proposed by the ordinance in this, that it directed that "the legislature shall ascertain the same as soon as may be practicable," and the legislature could ascertain it only by the method proposed by the ordinance.

But here, again, is a desperate assumption as a fact of what at most is but conjectural. Why was the legislature restricted as to the method of ascertainment to that fantastic device proposed by the ordinance?

We have shown, and may repeat, that by the method of

the ordinance it is now agreed and insisted by counsel for West Virginia no proportion whatever of the public debt of Virginia could possibly be ascertained. If by the method prescribed or proposed it is now agreed that no proportion—just or equitable or possible—could be ascertained, how can it be reasonably contended that the two States did solemnly agree that by that method only should West Virginia's liability be ascertained? If there was such an agreement or compact entered into between the two States, and they did know at the time that the method agreed on was impracticable, futile, and impossible, and with such knowledge did enter into such compact, then it was a fraud on the creditors whose rights they professed to be providing for and a deliberate fraud on the real Commonwealth of Virginia, upon which, at last, the entire burden of the public debt, as they well knew, inevitably falls. On the other hand, if the two States entered into this compact in ignorance of the fact that the method agreed on between them was impracticable and could not accomplish the result for which it was intended, then the compact, void as to this feature of it, because founded on mutual mistake.

But was the provision made by the constitution based upon the provision made by the ordinance and intended by its framers to be carried out by the method proposed by the ordinance?

Let the two provisions be contrasted with each other:

Ninth Section of the Ordinance.

The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of the debt contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in the lands within the proposed State derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed new State, and shall be governed by the laws now existing in the State of West Virginia.

Eighth Article of Constitution.

An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years.

The general purpose and avowed object of both provisions was to fix upon the new State to be formed out of a part of

the territory of Virginia a reasonably proper proportion of the public debt of the Commonwealth to the creation of which the people of both the old and the new State had, through their common legislature, contributed and in the benefits of which that people had equally participated. If, as insisted now by West Virginia, the framers of her constitution intended that her legislature should ascertain such proportion by the method proposed by the ordinance, and that method appears on its face and without the aid of external evidence to have been impracticable and impossible and leading inevitably to absurd and monstrous consequences, should any construction be given to the constitution that must involve such result?

Judge Cooley, in speaking of the rules for the construction of constitutions, and particularly of "unjust provisions," says (Constitutional Limitations, ed., p. 73):

> "We do not say, however, that if a clause should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences, it might not be the duty of the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aims of the instrument."

The application of this rule of construction must relieve the constitutional convention of the charge made by West Virginia that it intended by the eighth section of the eighth article of the constitution framed by it to adopt the method proposed by the ordinance as the only method by which the legislature should ascertain the amount of West Virginia's liability. It is by construction only that the conclusion can be reached that the two States by solemn compact agreed, through the medium of this constitutional provision, that the method of the ordinance was the method that should be employed.

Passing from the matter of construction, let us proceed to contrast the two provisions. We observe, in the first place, that the constitutional provisions employ different words and phrases from those employed in the ordinance. On the theory that the provision of the constitution is but a continuation of that made by the ordinance—that they are to be construed *in pari materia*, and, if possible, made to stand together—the inquiry is at once suggested, why this change of words? This court has said that "a change in phraseology creates a presumption of a change in intent" (Crawford *vs.* Burke, 195 U. S., 190).

The ordinance said: "The new State shall take upon itself a just proportion."

The constitution said: "An equitable proportion, &c., shall be assumed."

Does this "change in phraseology create a presumption of change in intent?" Have the words employed in the one a different significance from those employed in the other?

In Anderson's Dictionary of Law (1889) these words are thus defined:

> "JUST.—Probable, adequate, equivalent.
>
> "EQUITABLE.—1. According to natural right and justice, just and right in a particular case, as distinguished from the strict rule of a general law.
>
> "2. That which can be sustained or made available or effective in a court of equity, or upon principles of equity jurisprudence."

"Just" characterizes the result sought to be reached by arbitration, while "equitable" characterizes the result sought to be reached by the chancellor in applying the rules and principles of equity jurisprudence.

The arbitrator is controlled by what he regards as the rules of common sense—fairness between man and man. The chancellor is controlled by ascertained and established rules and doctrines laid down in judicial decision and by text-writers of accepted authority.

The results to be reached by the application prescribed by the ninth section of the Wheeling ordinance were doubtless regarded by its framers as "just" under all the circumstances of their status, historical, economical, and political; but under the interpretation given to that method by the learned counsel for West Virginia and from its admitted inadequacy for the ascertainment of the proper proportion of this public debt to be borne by West Virginia, it cannot be accepted as "equitable."

Indeed, it is manifest that the counsel for West Virginia, in their contentions on the demurrer, have regarded the matter in dispute here as having been referred by both States to the arbitrament and award of the legislature of West Virginia. Mr. Carlisle, in his argument on the demurrer (1 May's Comp., p. 181), said:

> "Virginia referred this matter absolutely to the judgment of the legislature of West Virginia and tacitly agreed to abide by the action of this legislative body."

And again (page 190) he said:

> "An examination of the Wheeling ordinance shows that the amount of the Virginia debt, as it existed prior to January the first, 1861, *is not a factor to be taken into consideration in ascertaining West Virginia's just proportion.*"

That is, the just proportion of a thing may be ascertained without knowing what the thing is—the amount or the extent of the thing of which the just proportion is to be ascertained is not a factor to be taken into consideration in the calculation.

Now, when we find the convention with the ordinance before it rejecting the word "just" and employing the word "equitable," is it not a reasonable presumption that it perceived that the method proposed by the ordinance could not ascertain a "just proportion" or an equitable proportion, and

that it was unwilling to employ terms that might indicate that it approved of or countenanced that method, and for that reason it changed the word employed in the ordinance and substituted the word "equitable" to indicate that the proportion to be assumed by West Virginia was such as a court of equity might ascertain, but which could not be ascertained by the method proposed by the ordinance?

But we are told that this court has already decided this question, and has held that when the convention provided by the eighth section of the eighth article of the constitution that "the legislature should ascertain the same as soon as practicable," it referred to the method of ascertainment prescribed by the Virginia convention. Let us examine that contention.

West Virginia demurred to the bill on a ground not stated in either the formal demurrer filed or in the amended demurrer, but stated for the first time in Mr. Carlisle's brief (1 May's Comp., p. 186) as follows, viz.:

> "The two States have, therefore, by compact between themselves and with the consent of Congress, as required by the constitution, designated a tribunal to ascertain and settle West Virginia's share of the debt. This tribunal still exists, and is unquestionably competent to discharge the duties imposed upon it. And, moreover, but most important of all, *it is the only tribunal existing or that can be established possessing the power to provide for the payment of West Virginia's share of the debt when the same has been ascertained, in accordance with the terms of the compact.* It cannot be coerced by any judicial or other civil process known to the constitution or laws of the country. No court can compel it either to adjust the debt or to provide a sinking fund, or impose taxes, issue bonds, or appropriate money."

It was in meeting that ground of demurrer that the Chief Justice used the language which is now relied on as expressing a final judgment on the facts. He said:

> "It is, however, further insisted that this court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of Congress, by which the question of the liability of West Virginia to Virginia was submitted to the arbitrament and award of the legislature of West Virginia as the sole tribunal which could pass upon it."

And then, after referring to the provisions of the constitution and to the act of the Virginia legislature of May 13, 1862, the Chief Justice proceeded:

> "When Virginia, on August 20, 1861, by ordinance provided for the formation of a new State out of the territory of this State, and declared therein that 'the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861,' to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should 'ascertain the same as soon as practicable,' it referred to the method of ascertainment provided by the Virginia convention."

The court was not here deciding as a fact that the constitutional convention did refer to the method of ascertainment provided by the ordinance. It was meeting the objection urged in support of the demurrer, that this court could not exercise jurisdiction to "ascertain and settle West Virginia's share," because the two States had agreed to submit that matter to the arbitrament and award of the West Virginia legislature.

It said, in substance: Assuming that this alleged compact was entered into between the two States, yet enough appears on the face of the bill to show that the legislature was not vested with absolute, exclusive power to determine the matter by any method it saw fit to employ, because when the

convention referred the matter to the legislature to ascertain West Virginia's equitable proportion of the debt it is to be supposed that it referred to the method provided by the ordinance.

This merely suggests a theory, consistent with the case stated in the bill, which is sufficient to meet the theory advanced by the demurrant. It decides nothing more. The court decides nothing as to the merits of the method provided by the ordinance, nothing as to adequacy, efficiency, or its adaptability to meet the requirements of the professed object of the ordinance, and nothing as to the persons who contrived that method or as to their real object and purpose in contriving it as they did. If it now is made evident that the method provided by the ordinance is inappropriate, that no proportion whatever of the public debt can be ascertained by it, can this court be asked to apply it? If the two States agreed upon, knowing its inefficiency or not knowing it, can a compact founded in fraud or in ignorance be insisted on? If the convention that framed the constitution, having before it the ninth section of the ordinance and being persuaded that the method proposed by it would defeat the very object and purpose of the framers of the constitutions, which was to ascertain an equitable proportion of the debt, did reject that method and employed other and different terms from those employed in the ordinance, should it be presumed to have intended that some other method should be employed by the legislature?

Finally, from all the facts and considerations here indicated, can it be held or presumed that the framers of the constitution intended to adopt, approve, or recognize the method proposed by the ordinance as the method by which they contemplated that the legislature would ascertain the equitable proportion to be borne by West Virginia?

The act of Congress of 31st of December, 1862, admitting the State of West Virginia into the Union, did not affirm the Wheeling ordinance, expressly or by implication, nor did it affirm the alleged compact between Virginia and West Virginia.

Mr. Carlisle has stated the transaction as he contends for it as follows:

> "The compact was entered into by the sovereignty conventions of the two States. In one the proposition was made in the form of an ordinance and in the other it was accepted in the form of a constitutional provision; and then it was consented to by Congress, and thus became an absolute and permanent obligation of the two States, which neither of them could thereafter abrogate or alter" (1 May's Comp., p. 386).

We have seen that the convention of August 20, 1861, which framed the Wheeling ordinance, providing for the election of the constitutional convention, which assembled in November, 1861, directed, in the tenth section of that ordinance—

> "that when the General Assembly shall give its consent to the formation of the new State, it shall forward to the Congress of the United States such consent, together with *'an official copy of such constitution,'* with the request that the new State be admitted into the Union of States."

It did not direct that there should be forwarded to the Congress an official copy of the Wheeling ordinance, because between that convention and its function and its work and the Congress of the United States there was no sort of relation or connection. The function of that convention was merely to provide for the assembling of another convention in the future, to which should be entrusted the

more important work of framing a constitution for the new State.

The functions and powers of the August convention expired upon its adjournment *sine die*. It had provided for an election of delegates to the November convention and had laid certain duties upon the Governor of the State and certain other duties upon the legislature, all relating to the work of the approaching convention, and then it adjourned. It performed no act of which the Congress of the United States could take cognizance. It purported to be speaking for Virginia and not for West Virginia, and it was West Virginia alone that was to deal with Congress. Hence it was that the constitution framed by the people of the proposed new State of West Virginia, and not the ordinance framed by the people of Virginia, was the only instrument proper or needful to be forwarded to Congress upon the application of West Virginia for admission into the Union.

We have seen that the convention of November, 1861, when it framed the constitution for West Virginia, utterly ignored and disregarded the provision made by the Virginia convention of August, 1861, for the ascertainment of the just proportion of the public debt of Virginia to be taken upon itself by West Virginia.

The November convention doubtless regarded the provision proposed by Virginia as an attempted invasion of the sovereign rights of the new State an impertinent intrusion into a matter which was peculiarly one of domestic concern to her as to which Virginia could not decently dictate. There is nothing in this record to warrant the suggestion that the Wheeling ordinance was ever before Congress or known to that body when it passed the act admitting West Virginia into the Union. On looking to the act itself, we find that it refers to the constitution framed by the convention which assembled on the 26th of November, 1861, and to the act of the Virginia legislature of May 13, 1862, giving consent to the erection of the new State, but it nowhere

refers to the convention which assembled in August or to the ordinance passed by that convention.

We have seen that the consent of Virginia was given to the erection of the new State "according to the boundaries and under the provisions set forth in the constitution for the State of West Virginia * * * proposed by the convention which assembled in Wheeling on the 26th day of November, 1861."

We have seen that the convention which framed the constitution for West Virginia makes no reference whatever to the convention of August or to the ordinance framed by that convention, and although it deals with the matter of West Virginia's equitable proportion of the public debt of Virginia, it does not refer to the provision proposed for the same matter by the ninth section of the ordinance. Upon what ground, then, we ask, is it contended that the provisions of that ordinance ever came to the knowledge and received the consideration of Congress, and that Congress admitted West Virginia into the Union subject to a compact between Virginia and West Virginia, which compact embraced the provisions of the ordinance?

The act of Congress admitting West Virginia expressly declares that she is admitted "on an equal footing with the original States in all respects whatever."

The constitutions of the several original States defined their rights, powers, and duties. None of them came into being as members of the Union with any restriction imposed upon them as to their right to determine how and in what manner their domestic concerns should be managed. Yet the claim here asserted is that West Virginia was admitted into the Union shorn of any right or discretion to determine how her proportion of this congenital debt should be ascertained.

We believe that we have shown that the evidence relied on by West Virginia is altogether insufficient to establish any compact or agreement whatever formed between her and

Virginia at the period of her creation; that the Wheeling ordinance, and especially the ninth section thereof, was not recognized by the convention that framed the constitution for West Virginia in November, 1861, and did not enter in spirit or substance into that constitution; that it was not known to or considered by the Congress of the United States when it passed the act admitting West Virginia into the Union; that there was no special agreement or compact entered into between Virginia and West Virginia providing a method for ascertaining the contributive proportion to be borne by West Virginia of the public debt of Virginia, and that therefore that proper portion of this public debt to be borne by West Virginia rests alone upon the recognized doctrines of international law, and that no exception has been shown to have existed which takes her case out of the operation of that law.

The act of the Virginia legislature giving consent to the creation of the new State within its jurisdiction did not regard the Wheeling ordinance, and the consent was not given on the condition, expressed or implied, that the ordinance or any of its provisions should form a compact between the States.

The act was passed on the 10th of May, 1862, and is in part as follows:

> "*Be it enacted by the General Assembly*, That the consent of the legislature of Virginia be, and the same is hereby given, to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of * * * according to the boundaries *and under the provisions* set forth in the constitution for the said State of *West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November*, 1861," &c.

The consent, then, was given, not under the provisions of the ordinance adopted by the convention which assembled at Wheeling in August, 1861, but under the provisions of the constitution for the State of West Virginia proposed by the convention which assembled at Wheeling on the 26th day of November, 1861.

Why was this unusual precision of language used to describe the exact conditions under which that consent was given? Not content with stating that the consent was given to the erection of a State "under the provision of the *constitution*," they proceed further to identify that constitution as the one proposed by a convention which assembled in November, and not by a convention which had assembled in the same place in the previous August.

The object really appears to have been to exclude the notion, now insisted on, that the ordinance framed by the convention which assembled in August exercised any influence or control whatever on the action of the legislature in giving its consent.

It certainly tends to exclude that notion that the legislature expressly declared that the consent was given to the State which was to be under the provisions of a constitution which was before it, and not under the provisions of the Wheeling ordinance, which was not mentioned or referred to in the act.

How, then, can it be insisted, as it is insisted in behalf of West Virginia, that this act of the Virginia legislature was a ratification of the ordinance?

Mr. Carlisle (1 May's Comp., p. 386) says in his carefully prepared brief:

> "We insist that the compact is binding as a whole or it is not binding at all, and that the act of the Virginia legislature, passed May 13th, 1862, while it was not necessary to the validity of the compact, constituted a ratification of it by that body."

We utterly deny that there was any compact or agreement whatever between Virginia and West Virginia, and that the whole notion is a creation of the imagination of counsel—necessary, it may be, to the completeness of the kaleidoscopic dream which in its varying forms has been projected here as a defense to the bill.

Mr. Justice Story, in his Commentaries on the Constitution, section 1405, says:

> "Thus, where a State is admitted into the Union notoriously upon a compact made between it and the State of which it previously composed a part, there the act of Congress admitting such State into the Union is an implied consent to the terms of the compact. This was true as to the compact between Virginia and Kentucky upon the admission of the latter into the Union, and the like rule will apply to other States, such as Maine, more recently admitted into the Union."

The compact between Virginia and Kentucky was notorious because it was incorporated into the constitution of Kentucky, but the ninth section of the Wheeling ordinance was not incorporated into the constitution of West Virginia, but rather, as we have seen, was repudiated and rejected by the convention that framed that constitution. Where, then, shall we look to learn its terms and conditions? It is now insisted that the ninth section was a proposition submitted by Virginia to West Virginia as a condition in which alone Virginia would consent to the erection of the new State.

Mr. Carlisle's construction of the several transactions is thus stated:

> "The convention proposed that a new State might be formed, to be called the State of Kanawha, to include certain counties, and that the new State should assume a just proportion of the public debt of Virginia as it existed on the 1st day of January, 1861, to be ascertained, as stated in the ordinance, by charging to the new State all the money expended

> within her limits—within the limits of that territory—since any part of the debt was contracted, and with her just proportion of the ordinary expenses during the same time, and crediting the new State with all money that has been paid in from that territory during the same period. That was Virginia's proposition to the new State. Of course, there was no State of Kanawha at that time, and therefore there was no second party to the proposed contract; but subsequently the people within that territory assembled in a sovereignty convention, and then, for the first time they had a right, and the power, to consent or dissent from the proposition that Virginia had made. It was still open; it had not been withdrawn; and the new State accepted it *with these additions;* that the amount of the debt should be ascertained by the legislature of the new State as soon as practicable, and that it should establish a sinking fund sufficient to provide for the payment of the interest, and the redemption of the principal within thirty-four years."
>
> 1 May's Comp., page 357.

This is a full, clear statement of the compact. But, pray, by what process of reasoning and by what rules of construction is the provision made in the eighth article of the constitution made *in addition* to the ninth section of the ordinance?

We have shown, we think, that the two provisions are repugnant to each other; that the provision made in the constitution was a distinct repudiation and rejection of the provision made in the ordinance; that it was a substitute for it, and was made final and conclusive by being embodied in the fundamental law of the State.

West Virginia at no time and in no form ever accepted the proposition made to it by Virginia through the Wheeling ordinance. The constitution of West Virginia was the final word spoken on the subject, and it nowhere speaks or refers to the proposition contained in the ordinance, but ignores it save in so far as it adopted a wholly different and

conflicting provision as to the subject-matter of the ordinance.

An act of legislature repealing a previous enactment may in a loose and very inaccurate sense be said to be an *addition* to the previous act. It refers in express terms to the previous act, or else in general terms by repealing "all acts inconsistent with this act." It recognizes that there are or may be acts having provisions inconsistent with this act. But here it is apparent, and indeed admitted, that while the ordinance proposes a method for ascertaining a "just proportion of the public debt," that the method proposed is unfit and inadequate for such ascertainment, because there is no relation between the amount of such debt and the method proposed for ascertaining a proportion of it, as counsel for West Virginia insist "that the amount of the debt is not a factor to be taken into consideration in ascertaining West Virginia's just proportion of it." So it is manifest that the method proposed is inconsistent with and repugnant to the expressed object and purpose of the ninth section of the ordinance.

The eighth article of the constitution of West Virginia contains no such vicious method of ascertainment. Its provisions are altogether inconsistent with it. How, then, can the ninth section of the ordinance and the eighth article of the constitution be read together, and how can the method proposed by the ordinance be "added" to the provision of the constitution? As already shown, the suggestion made by this court in its opinion on the demurrer to the bill was but the indication of a view that on a demurrer, where every presumption is to be taken against the demurrant which is warranted by the case stated in the bill, that for all that appeared on the face of the bill it was not impossible that the language used in the constitution had reference to the method proposed in the ordinance. But it cannot be seriously contended here on the final hearing that the opinion of the court on the demurrer was intended to adjudicate and

determine any matter of fact involved in the issue on the merits of the case.

The ordinance providing for the creation of the new State was not necessary or material to the creation of that State. The consent of Virginia and the act of Congress were all that was needed, and had there been no ordinance at all the validity of the act of Congress would be beyond question in the courts. When the State was created and admitted into the Union the ordinance became exhausted and at an end.

The point here is whether the ninth section of that ordinance, which assumed to prescribe to the new State the method by which its liabilities should be ascertained and provided for after the State was clothed with sovereignty, was not vain and futile because of an attempted limitation on the sovereignty of the State and an invasion of her domestic concerns.

Summary of the points herein made in support of the argument that the plan or method for ascertaining West Virginia's proper proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, indicated in the International Law doctrine, as recognized in the case of Hartman vs. Greenhow, 102 U. S., 672, is the only plan that can be adopted, and that the plan proposed by the ninth section of the "Wheeling Ordinance" is now shown to be unjust and impracticable.

(1.) The aggregate amount of the public debt as of January 1, 1861, is ascertained to be $33,897,073.82.

This is charged in the bill and admitted in the answer, and now found by the special master in paragraph of his report.

(2.) The government of the "Restored State of Virginia" was set up in June, 1861, and gave its consent to the erection of the new State of West Virginia out of part of the territory of Virginia. The Restored State of Virginia was

recognized by the political departments of the United States as the lawful State of Virginia, and as such was represented in the Congress of the United States.

(3.) Upon the partition of the territory of Virginia and the erection of the State of West Virginia upon one of those parts, that new State, under the doctrines of international law, became liable for an equitable and proper proportion of the debt of the parent State on the basis of territory and population, unless some other method of fixing such proportion was provided by *a special agreement between the two States.*

(4.) The burden of proof lies upon the State claiming under such *special agreement* to prove the same by adequate evidence, and such evidence must be the same that would be required in a like case between private parties.

(5.) If such special agreement consisted of a proposition made by Virginia to West Virginia, then, before such agreement could be formed, it must appear that West Virginia accepted the terms proposed, without addition thereto or subtraction therefrom, but absolutely and unconditionally. If one term of such proposal was omitted, or other terms added, that was a rejection and not an acceptance of the proposal.

(6.) If the ninth section of the "Wheeling Ordinance" is relied on as the proposal, and the eighth section of the eighth article of the constitution of West Virginia is relied on as the acceptance of the proposal, then it is manifest from a comparison of the two that West Virginia did not accept such proposal in the terms in which it was made, but rejected the same.

(7.) The averment by West Virginia that the language employed in the eighth article of the constitution—"and the legislature shall ascertain the same"—meant that the legislature should ascertain it by the method proposed by the ordinance, finds no support from anything that appears in this record, and is not warranted by the character of the transaction, the relation of the parties, or by the inherent

nature of the method proposed by the ordinance, because—

(8.) The method proposed by the ordinance is now admitted by counsel for West Virginia and is found as a fact by the special master to bear no relation whatever to the amount of the public debt, and is inadequate and incapable of employment in the ascertainment of any proportion whatever of such debt.

(9.) That the method proposed by the ninth section of the ordinance for ascertaining West Virginia's proportion of the public debt was not a term proposed by Virginia, upon the acceptance of which she would consent to the creation of the new State. It was not a condition precedent or subsequent to the creation of such new State, and, in both its *form* and its *subject-matter,* could not have been intended, or if intended could not have been allowed, as a reasonable and proper provision in an ordinance adopted by one State looking to the creation of a new State within its territory.

(10.) That the act of the legislature of Virginia of February 13, 1862, giving its consent to the erection of the new State, cannot be construed as basing such consent upon the ninth section of the ordinance, because, in express terms, it bases it upon the provision of the *constitution,* and does it in such terms as to exclude the notion that it contemplated the action of any other convention than the November convention that framed the constitution.

(11.) That the convention that framed the constitution did not regard the ninth section of the Wheeling ordinance as controlling its action to any extent appears from the fact that it changed the name of the State from that fixed by the prior convention and prescribed wholly different terms and methods for ascertaining West Virginia's proportion of the debt from that proposed by the ordinance.

(12.) That the Congress of the United States, before it admitted West Virginia into the Union, inquired, through certain of its members, in open session, as to what provision had been made for the payment of the public debt, and not

ntil the assurance had been given that such provision had een made by its *constitution* did it admit the State. It annot be supposed that Congress would have admitted it ad it appeared that the only provision for meeting West Virginia's proper proportion of the debt was made in the ninth section of the ordinance, which, it is now admitted, bears no relation whatever to the amount of that debt.

These considerations, I confidently submit, make it impossible for this court to hold that the method proposed by the ninth section of the ordinance can be employed to ascertain the proportion of the public debt proper to be borne by West Virginia. The only other method practicable for this purpose is that indicated by the well-established doctrine of international law.

HOLMES CONRAD,

Counsel for the Bondholding Creditors of Virginia.

SEPTEMBER 5, 1910.

INDEX TO METHOD OF COMPUTING INTEREST ON THE CLAIM AGAINST WEST VIRGINIA, BASED ON THE DIVISION OF THE DEBT AS IT EXISTED JANUARY 1ST, 1861:

Group 1—6% Registered Bonds redeemable at the pleasure of the General Assembly.....	$9,729,326.36
This amount is divided on the various bases shown in Joint Exhibit B1 and interest on only that portion chargeable to West Virginia is computed from Jan. 1, 1861, to Sept. 1, 1909.	
Group 2—5% Registered Bonds redeemable at the pleasure of the General Assembly.....	452,200.00
Treated in the same manner as Group 1.	
Group 3—6% Annuity on old James River Stock....	350,000.00
Treated in the same manner as Groups 1 and 2.	
Group 4—6% Registered Bonds Redeemable in 20 years	125,393.27
No interest on this sum computed from Jan. 1, 1861.	
Group 5—6% Registered Bonds redeemable in 34 years.....	8,861,864.33
The interest on each of the four loans grouped hereunder is computed from Jan. 1, 1861, to a date 34 years after the date of the act authorizing such issue, and this interest is divided on the various bases shown in Joint Exhibit B1.	
Group 6—6% Coupon Bonds redeemable in 35 years.	13,082,500.00
This amount is divided on the various bases shown in Joint Exhibit B1 and interest on only that portion chargeable to West Virginia is computed from Jan. 1, 1861, to Mar. 29, 1886, being 35 years after Mar. 29, 1851, the date of the act authorizing this issue.	
Group 7—6% Registered Bonds in lieu of Coupon bonds redeemable in 35 years.....	1,059,500.00
This amount is divided on the various bases shown in Joint Exhibit B1 and interest on only that portion chargeable to West Virginia is computed from Jan. 1, 1861, to Mar. 29, 1886, being 35 years after Mar. 29, 1851, the date of the first act authorizing the issue of Coupon Bonds for which these bonds were exchanged.	
Group 8—5% Registered Bonds redeemable in 35 years.....	5,000.00
Carried forward	$33,665,783.96

Brought forward	$33,665,783.96
The interest on this sum is computed from Jan. 1, 1861, to Mar. 19, 1866, being 35 years after Mar. 19, 1831, the date of the act authorizing this issue, and this interest is divided on the various bases shown in Joint Exhibit B1.	
Group 9—5% Sterling Coupon Bonds redeemable in 35 years	1,815,204.50
This amount is divided on the various bases shown in Joint Exhibit B1 and interest on only that portion chargeable to West Virginia is computed from Jan. 1, 1861, to Mar. 29, 1886, being 35 years after Mar. 29, 1851, the date of the act authorizing this issue.	
	$35,480,988.46

GROUP 1.

6% Registered Bonds Redeemable at Pleasure of General Assembly.

	Amount
Alleghany & Huntersville Road	$5,000.00
Alexandria Canal Co.	234,200.00
Berryville Turnpike Co.	8,000.00
Berryville & Charlestown Turnpike Co.	6,400.00
Beverly & Fairmount Road	16,600.00
Blue Ridge Railroad Co.	32,200.00
City Point Railroad Co.	50,000.00
Charlestown & Point Pleasant Turnpike Co.	20,800.00
" " " "	5,800.00
Cacapon & North Branch Turnpike Co.	11,000.00
Cumberland Gap Road	67,600.00
Clarkburg & Buckhannon Turnpike Co.	9,000.00
Coal River Navigation Co.	4,000.00
Dismal Swamp Canal Co.	16,500.00
Dragon Swamp Navigation Co.	1,464.00
Exchange Bank of Virginia & Northwestern Bank of Virginia	447,407.00
Giles Fayette & Kanawha Turnpike Co.	13,400.00
Goose Creek & Little River Navigation Co.	7,000.00
Holliday Cove Turnpike Co.	4,700.00
Huntersville & Warm Springs Turnpike Co.	300.00
Hardy & Winchester Turnpike Co.	19,300.00
Howardsville & Rockfish Turnpike Co.	9,000.00
Hampshire & Morgan Turnpike Co.	4,600.00
Ice's Ferry Road	1,358.00
Bank of Virginia	99,000.00
Carried forward	$1,094,629.00

6% Registered Bonds Redeemable at Pleasure of General Assembly—(Continued).

Brought forward	$1,094,629.00
James River Co.	149,083.33
" " "	170,050.00
" " "	13,000.00
" " "	3,500.00
James River & Kanawha Co.	1,925,683.59
" " " " "	250,000.00
" " " " "	1,216,950.00
" " " " "	110,000.00
Jordans Furnace & Rockbridge Turnpike Co.	3,600.00
Louisa Railroad Co.	171,750.00
" " "	131,687.00
" " "	12,900.00
Lewisburg & Blue Sulphur Springs Turnpike Co.	1,000.00
Lafayette & English Ferry Turnpike Co.	2,550.00
Lynchburg & Buffalo Springs Turnpike Co.	8,500.00
Little Stone Gap Road	3,000.00
Marshall & Ohio Turnpike Co.	9,000.00
Moorefield & North Branch Turnpike Co.	12,900.00
Morgantown & Bridgeport Turnpike Co.	1,940.00
Moorefield & Alleghany Turnpike Co.	3,600.00
Morgantown & Beverly Road	3,000.00
Natural Bridge Turnpike Co.	6,100.00
North Carolina & Wytheville Road	100.00
North Western Turnpike Road	65,850.00
" " " "	16,600.00
" " " "	2,000.00
" " " "	12,484.00
" " " "	9,354.73
" " " "	5,100.00
" " " "	9,100.00
Newmarket & Sperryville Turnpike Co.	12,000.00
Ohio River & Maryland Line Road	2,000.00
" " " " "	6,600.00
" " " " "	108,900.00
Orange & Alexandria Railroad Co.	150,000.00
Petersburg Railroad Co.	64,950.00
Portsmouth & Roanoke Railroad Co.	50,000.00
" " " "	9,090.10
Pittsylvania, Franklin & Botetourt Turnpike Co.	176,400.00
Richmond & Petersburg Railroad Co.	50,000.00
" " " "	13,350.00
Rappahannock Co.	97,100.00
" "	4,900.00
Red & Blue Sulphur Springs Turnpike Co.	6,300.00
Rivanna Navigation Co.	380,090.00
Richmond & Danville Railroad Co.	3,520.00
Richlands to Kentucky Line Road	10,000.00
Rocky Mount Turnpike Co.	1,100.00
Rich Patch Turnpike Co.	4,500.00
Staunton & Parkersburg Road	16,510.00
" " " "	
Carried forward	$6,592,321.75

6% Registered Bonds Redeemable at Pleasure of General Assembly—(Concluded).

Brought forward	$6,592,321.75
Salem & Pepper's Ferry Turnpike Co.	5,400.00
Salem & Newcastle Turnpike Co.	3,875.00
South Western Turnpike Road	81,970.00
" " " "	153,162.00
Smiths River Navigation Co.	2,600.00
Tazewell Court House and Fancy Gap Road	3,420.00
Upper Appomattox Co.	43,900.00
Valley Turnpike Co.	233,813.00
" " "	24,664.00
Virginia & Maryland Bridge Co.	10,000.00
Virginia, Tennessee Railroad Co.	66,800.00
Winchester & Potomac Railroad Co.	10,000.00
" " " " "	133,935.00
Wheeling, West Liberty & Bethany Turnpike Co.	10,867.61
Weston & Fairmount Turnpike Co.	4,000.00
Weston & Gauley Bridge Turnpike Co.	5,000.00
Wellsburg & Bethany Turnpike Co.	1,700.00
Williamsport Turnpike Co.	1,250.00
Registered Bonds	2,340,648.00
	$9,729,326.36

Elapsed time from Jan. 1, 1861, to Sept. 1, 1909 = 48 years, 8 months.

37.3686% of the above principal sum chargeable to W. Va. on basis of land area as per B1	$3,635,713.05	
Interest on same		$10,616,282.10
36.1843% of the above principal sum chargeable to W. Va. on basis of total area as per B1	3,520,488.64	
Interest on same		10,279,826.86
21.7812% of the above principal sum chargeable to W. Va. on basis of assessed valuation of real estate as per B1	2,119,164.03	
Interest on same		6,187,958.97
24.5145% of the above principal sum chargeable to W. Va. on basis of population — estimated— with slaves as per B1.	2,385,095.71	
Interest on same		6,964,479.47

33.5231% of the above principal sum chargeable to W. Va. on basis of population — estimated — without slaves as per B1		$3,261,571.80	
Interest on same...			$9,523,789.66

GROUP 2.

5% Registered Bonds Redeemable at Pleasure of General Assembly.

James River Co.....	$29,000.00
" " "	37,000.00
" " "	4,000.00
" " "	8,000.00
" " "	15,000.00
" " "	4,000.00
" " "	10,000.00
North Western Turnpike Road.....	12,200.00
Portsmouth & Roanoke Railroad Co.....	104,000.00
" " " "	100,000.00
Richmond, Fredericksburg & Potomac R. R. Co....	121,000.00
Winchester & Potomac Railroad Co.....	8,000.00
	$452,200.00

Elapsed time from Jan. 1, 1861, to Sept. 1, 1909=48 years, 8 months.

37.3686% of the above principal sum chargeable to W. Va. on basis of land area as per B1.....	$168,980.81	
Interest on same...		$411,186.64
36.1843% of the above principal sum chargeable to W. Va. on basis of total area as per B1.....	163,625.40	
Interest on same...		398,155.14
21.7812% of the above principal sum chargeable to W. Va. on basis of assessed valuation of real estate, as per B1.....	98,494.59	
Interest on same...		239,670.17
24.5145% of the above principal sum chargeable to W. Va. on basis of population — estimated — with slaves, as per B1	110,854.57	
Interest on same...		269,746.12

33.5231%	of the above principal sum chargeable to W. Va. on basis of population — estimated — without slaves, as per B1	$151,591.46	
	Interest on same...		$368,872.55

GROUP 3.

JAMES RIVER ANNUITY, 6%.

James River Co... $350,000.00

Elapsed time from January 1, 1861, to September 1, 1909 = 48 years, 8 months.

37.3686%	of the above principal sum chargeable to W. Va. on basis of land area as per B1.....	$130,790.10	
	Interest on same...		$381,907.09
36.1843%	of the above principal sum chargeable to W. Va. on basis of total area as per B1.....	126,645.05	
	Interest on same...		369,803.55
21.7812%	of the above principal sum chargeable to W. Va. on basis of assessed valuation of real estate as per B1..	76,234.20	
	Interest on same...		222,603.86
24.5145%	of the above principal sum chargeable to W. Va. on basis of population — estimated — with slaves as per B1.	85,800.75	
	Interest on same...		250,538.19
33.5231%	of the above principal sum chargeable to W. Va. on basis of population — estimated — without slaves as per B1.	117,330.85	
	Interest on same...		342,606.03

GROUP 4.

6% REGISTERED BONDS REDEEMABLE IN 20 YEARS.

Staunton & Pakersburg, Loan No. 16. Act of March 16, 1838	$125,393.27
37.3686% of this principal sum chargeable to W. Va. on basis of land area.....	$46,857.71
36.1843% of this principal sum chargeable to W. Va. on basis of total area.....	45,372.67
21.7812% of this principal sum chargeable to W. Va. on basis of assessed valuation of real estate	27,312.16
24.5145% of this principal sum chargeable to W. Va. on basis of population—estimated, with slaves.	30,739.53
33.5231% of this principal sum chargeable to W. Va. on basis of population—estimated, without slaves	42,035.71

No interest charged to West Virginia on this loan from Jan. 1, 1861.

GROUP 5.

6% Registered Bonds Redeemable in 34 Years.

James River & Kanawha Co., Act Mar. 23, 1860	$2,520,000.00	
Interest on same from Jan. 1, 1861, to Mar. 23, 1894		$5,024,040.00
Being 34 years after Mar. 23, 1860, the date of the act authorizing this issue. Elapsed time, 33 years 82 days.		
(Loan No. 91.)		
Registered Bonds issued for Redemption of Warrants, Act Mar. 17, 1856	2,761,100.00	
Interest on same from Jan. 1, 1861, to Mar. 17, 1890		4,839,287.93
Being 34 years after Mar. 17, 1856, the date of the act authorizing this issue. Elapsed time, 29 years 76 days.		
(Loan No. 93.)		
Registered Bonds, Act Mar. 18, 1858	530,300.00	
Interest on same from Jan. 1, 1861, to Mar. 18, 1892		993,163.51
Being 34 years after Mar. 18, 1858, the date of the act authorizing this issue. Elapsed time, 31 years 77 days.		
(Loan No. 90.)		
Registered Bonds (coupons attached) Acts Mar. 29, 1851 } May 25, 1852 }	3,050,464.33	
Interest on same from Jan. 1, 1861, to Mar. 29, 1885		4,437,408.78
Being 34 years after Mar. 29, 1851, the date of the first act authorizing this issue. Elapsed time, 24 years 88 days.		
Total interest		$15,293,900.22

Of the above amount of interest there is chargeable to West Virginia on various bases shown in Joint Exhibit B1 as follows:

Land area	37.3686%	$5,715,116.40
Total area	36.1843%	5,533,990.74
Assessed valuation—real estate	21.7812%	3,331,194.99
Estimated population—with slaves	24.5145%	3,749,223.17
Estimated population—without slaves	33.5231%	5,126,989.46

GROUP 6.

6% Coupon Bonds Redeemable in 35 Years.

Coupon Bonds, Act of Mar. 29, 1851 ..... $13,082,500.00

Elapsed time from Jan. 1, 1861, to Mar. 29, 1886—25 years 88 days. Being 35 years after Mar. 29, 1851, the date of the act authorizing this issue.

37.3686% of the above principal sum chargeable to W. Va. on basis of land area as per B1..	$4,888,747.09		
Interest on same...			$7,404,822.25
36.1843% of the above principal sum chargeable to W. Va. on basis of total area as per B1..	4,733,811.05		
Interest on same...			7,170,145.80
21.7812% of the above principal sum chargeable to W. Va. on basis of assessed valuation of real estate as per B1..	2,849,525.49		
Interest on same...			4,316,081.27
24.5145% of the above principal sum chargeable to W. Va. on basis of estimated population, with slaves, as per B1.	3,207,109.46		
Interest on same...			4,857,701.80
33.5231% of the above principal sum chargeable to W. Va. on basis of estimated population, without slaves, as per B1	4,385,659.56		
Interest on same...			6,642,812.35

GROUP 7.

6% Registered Bonds Redeemable in 35 Years.

(Loan No. 92.)

Registered Bonds in exchange for Coupon Bonds, Act of Mar. 18, 1856.....		$1,059,500.00	
	Elapsed time from Jan. 1, 1861, to Mar. 29, 1886—25 years 88 days. Being 35 years after Mar. 29, 1851, the date of the first act authorizing the issue of coupon bonds for which these bonds were exchanged.		
37.3686%	of the above principal sum chargeable to W. Va. on basis of land area as per B1.....	$395,920.32	
	Interest on same...		$599,687.31
36.1843%	of the above principal sum chargeable to W. Va. on basis of total area as per B1.....	383,372.66	
	Interest on same...		580,681.79
21.7812%	of the above principal sum chargeable to W. Va. on basis of assessed valuation of real estate as per B1..	230,771.81	
	Interest on same...		349,542.36
24.5145%	of the above principal sum chargeable to W. Va. on basis of estimated population with slaves as per B1..	259,731.13	
	Interest on same...		393,406.08
33.5231%	of the above principal sum chargeable to W. Va. on basis of estimated population without slaves as per B1	355,177.24	
	Interest on same...		507,681.79

GROUP 8.

5% Registered Bonds Redeemable in 35 Years.

North Western Turnpike Road Loan No. 1. Act of March 19, 1831.....		$5,000	
Interest on same from Jan. 1, 1861, to Mar. 19, 1866..			$1,304.17
Being 35 years after Mar. 19, 1831, the date of the act authorizing this issue. Elapsed time, 5 years 78 days.			

Of the above amount of interest there is chargeable to West Virginia on various bases shown in joint Exhibit B1 as follows:—

Land area	37.3686%	$487.35
Total area	36.1843%	471.90
Assessed valuation of real estate.....	21.7812%	284.06
Estimated population—with slaves.....	24.5145%	319.71
Estimated population—without slaves...	33.5231%	437.20

GROUP 9.

5% STERLING COUPON BONDS REDEEMABLE IN 35 YEARS.

Sterling Coupon Bonds. Act of March 29, 1851.....		$1,815,204.50	
	Elasped time from Jan. 1, 1861, to Mar. 29, 1886—25 years 88 days. Being 35 years after Mar. 29, 1851, the date of the act authorizing this issue.		
37.3686%	of the above principal sum chargeable to W. Va. on basis of land area as per B1..	678,316.51	
	Interest on same...		$856,186.17
36.1843%	of the above principal sum chargeable to W. Va. on basis of total area as per B1..	656,819.04	
	Interest on same...		829,051.57
21.7812%	of the above principal sum chargeable to W. Va. on basis of assessed valuation of real estate as per B1..	395,373.32	
	Interest on same...		499,048.99
24.5145%	of the above principal sum chargeable to W. Va. on basis of estimated population with slaves as per B1.	444,988.31	
	Interest on same...		561,674.14
33.5231%	of the above principal sum chargeable to W. Va. on basis of estimated population without slaves as per B1	608,512.82	
	Interest on same...		768,078.40

INTEREST ON WEST VIRGINIA'S PROPORTION OF THE DEBT FROM JAN. 1, 1861, AS HEREINBEFORE CALCULATED, ON BASIS OF LAND AREA.

37.3686%

		Total amount of Debt.	Amount chargeable to West Virginia on basis of Land Area.	Interest thereon from Jan. 1, 1861, chargeable to West Virginia.
Group	1.....	$9,729,326.36	$3,635,713.05	$10,616,282.10
	2.....	452,200.00	168,980.81	411,186.64
	3.....	350,000.00	130,790.10	381,907.09
	4.....	125,393.27	46,857.71	.....
	5.....	8,861,864.33	3,311,554.63	5,715,116.40
	6.....	1,059,500.00	395,920.32	599,687.31
	7.....	13,082,500.00	4,888,747.09	7,404,822.25
	8.....	5,000.00	1,868.43	487.35
	9.....	1,815,204.50	678,316.51	856,186.17
		$35,480,988.46	$13,258,748.65	$25,985,675.31

INTEREST ON WEST VIRGINIA S PROPORTION OF THE DEBT ON BASIS OF TOTAL AREA.

36.1843%.

		Total Amount of Debt.	Amount chargeable to West Virginia on basis of Total Area.	Interest thereon from Jan. 1, 1861, chargeable to West Virginia.
Group	1.....	$9,729,326.36	$3,520,488.64	$10,279,826.86
	2.....	452,200.00	163,625.40	398,155.14
	3.....	350,000.00	126,645.05	369,803.55
	4.....	125,393.27	45,372.67	.....
	5.....	8,861,864.33	3,206,603.58	5,533,990.74
	6.....	1,059,500.00	383,372.66	580,681.79
	7.....	13,082,500.00	4,733,811.05	7,170,145.80
	8.....	5,000.00	1,809.22	471.90
	9.....	1,815,204.50	656,819.04	829,051.57
		$35,480,988.46	$12,838,547.31	$25,162,127.35

INTEREST ON WEST VIRGINIA'S PROPORTION OF THE DEBT ON BASIS OF ASSESSED VALUATION OF REAL ESTATE.

21.7812%

		Total Amount of Debt.	Amount chargeable to West Virginia on basis of Assessed Valuation of Real Estate.	Interest thereon from Jan. 1, 1861, chargeable to West Virginia.
Group	1.....	$9,729,326.36	$2,119,164.03	$6,187,958.97
	2.....	452,200.00	98,494.59	239,670.17
	3.....	350,000.00	76,234.20	222,603.86
	4.....	125,393.27	27,312.16	.....
	5.....	8,861,864.33	1,930,220.40	3,331,194.99
	6.....	1,059,500.00	230,771.81	349,542.36
	7.....	13,082,500.00	2,849,525.49	4,316,081.27
	8.....	5,000.00	1,089.06	284.06
	9.....	1,815,204.50	395,373.32	499,048.99
		$35,480,988.46	$7,728,185.06	$15,146,384.67

INTEREST ON WEST VIRGINIA'S PROPORTION OF THE DEBT ON BASIS OF ESTIMATED POPULATION—WITH SLAVES.

24.5145%.

		Total Amount of Debt.	Amount chargeable to West Virginia on basis of Estimated Population—With Slaves.	Interest thereon from Jan. 1, 1861, chargeable to West Virginia.
Group	1.....	$9,729,326.36	$2,385,095.71	$6,964,479.47
	2.....	452,200.00	110,854.57	269,746.12
	3.....	350,000.00	85,800.75	250,538.19
	4.....	125,393.27	30,739.53	.....
	5.....	8,861,864.33	2,172,441.73	3,749,223.17
	6.....	1,059,500.00	259,731.13	393,406.08
	7.....	13,082,500.00	3,207,109.46	4,857,701.80
	8.....	5,000.00	1,225.73	319.71
	9.....	1,815,204.50	444,988.31	561,674.14
		$35,480,988.46	$8,697,986.92	$17,047,088.68

INTEREST ON WEST VIRGINIA'S PROPORTION OF THE DEBT ON BASIS OF ESTIMATED POPULATION—WITHOUT SLAVES.

33.5231%.

		Total Amount of Debt.	Amount chargeable to West Virginia on basis of Estimated Population—Without Slaves.	Interest thereon from Jan. 1, 1861, chargeable to West Virginia.
Group	1.....	$9,729,326.36	$3,261,751.80	$9,523,789.66
	2.....	452,200.00	151,591.46	368,872.55
	3.....	350,000.00	117,330.85	342,606.08
	4.....	125,393.27	42,035.71	.....
	5.....	8,861,864.33	2,970,771.64	5,126,989.46
	6.....	1,059,500.00	355,177.24	507,681.79
	7.....	13,082,500.00	4,385,659.56	6,642,812.35
	8.....	5,000.00	1,676.16	437.20
	9.....	1,815,204.50	608,512.82	768,078.40
		$35,480,988.46	$11,894,327.24	$23,281,267.49

ACCRUED INTEREST FROM JULY 1ST, 1860, TO DECEMBER 31ST, 1860, ON PUBLIC DEBT OF VIRGINIA, AS PER JOINT EXHIBIT AI..... $1,053,067.63

WEST VIRGINIA'S PROPORTION OF SAID ACCRUED INTEREST ON PUBLIC DEBT ON VARIOUS BASES SHOWN IN JOINT EXHIBIT BI:

Land area	37.3686%	$393,516.63
Total area	36.1843%	381,045.15
Assessed Valuation of Real Estate.	21.7812%	229,370.77
Estimated Population, with Slaves.	24.5145%	258,154.26
Estimated Population, without Slaves	33.5231%	353,020.91

WEST VIRGINIA'S PROPORTION OF THE DEBT OF VIRGINIA ON JANUARY 1ST 1861, CONSISTING OF PRINCIPAL AND INTEREST ACCRUED AND PAYABLE AT THAT DATE, WITH INTEREST ON THE PRINCIPAL FROM JANUARY 1ST, 1861, AS HERETOFORE CALCULATED, ON THE VARIOUS BASES SHOWN IN JOINT EXHIBIT BI:

1. Land Area—37.3686%:		
West Virginia's Proportion of Principal (see page 13).	$13,258,748.65	
West Virginia's Proportion of Accrued Interest to Jan. 1st, 1861.....	393,516.63	
West Virginia's Proportion of Interest from Jan. 1st, 1861, as hereinbefore calculated.....	25,985,675.31	
		$39,637,940.59
2. Total Area—36.1843%:		
West Virginia's Proportion of Principal (see page 13).	$12,838,547.31	
West Virginia's Proportion of Accrued Interest to Jan. 1st, 1861.....	381,045.15	
West Virginia's Proportion of Interest from Jan. 1st, 1861, as hereinbefore calculated.....	25,162,127.35	
		$38,381,719.81
3. Assessed Valuation of Real Estate—21.7812%:		
West Virginia's Proportion of Principal (see page 14).	$7,728,185.06	
West Virginia's Proportion of Accrued Interest to Jan. 1st, 1861.....	229,370.77	
West Virginia's Proportion of Interest from Jan. 1st, 1861, as hereinbefore calculated.....	15,146,384.67	
		$23,103,940.50

4. Estimated Population, with Slaves—24.5145%:		
West Virginia's Proportion of Principal (see page 14)	$8,697,986.92	
West Virginia's Proportion of Accrued Interest to Jan. 1st, 1861	258,154.26	
West Virginia's Proportion of Interest from Jan. 1st, 1861, as hereinbefore calculated	17,047,088.68	
		$26,003,229.86
5. Estimated Population, without Slaves—33.5231%:		
West Virginia's Proportion of Principal (see page 15)	$11,894,327.24	
West Virginia's Proportion of Accrued Interest to Jan. 1st, 1861	353,020.91	
West Virginia's Proportion of Interest from Jan. 1st, 1861, as hereinbefore calculated	23,281,267.49	
		$35,528,615.64

All calculations contained in this Exhibit, consisting of pages 1 to 17 inclusive, made by us from joint Exhibits A-1 and B-1 of the Record, and certified correct.

ARTHUR G. POTTER.

PRICE, WATERHOUSE & Co.,
For the Plaintiff.

The foregoing seventeen pages are a calculation of West Virginia's proportion of the debt of Virginia, including the bonds held by the Sinking Fund, the Board of Public Works and the Literary Fund as a part of the debt. The Master in his report has not allowed the bonds held by the Sinking Fund, the Board of Public Works and the Literary Fund as a part of the public debt of Virginia, as the same existed on January 1, 1861, and West Virginia's proportion of these bonds is now deducted from her proportion of the debt as given in the preceding pages of this pamphlet. The accrued interest and the interest from January 1, 1861, as heretofore calculated, on West Virginia's proportion of these bonds is also deducted.

The following five tables show West Virginia's proportion of the debt of Virginia on January 1, 1861, excluding the bonds held by the Sinking Fund, the Board of Public Works and the Literary Fund as a part of the debt; and consisting of principal and interest accrued and payable at that date with interest on the principal from January 1, 1861, as heretofore calculated on the bases shown in joint Exhibit BI:

	West Virginia's Proportion of Debt, including holdings of Sinking Fund, Board of Public Works and Literary Fund.	West Virginia's Proportion of Bonds held by Sinking Fund, Board of Public Works and Literary Fund.	West Virginia's Proportion of Debt, excluding Bonds held by Sinking Fund, Board of Public Works and Literary Fund.
1. Land Area— *37.3686%*			
Principal	$13,258,748.65	$957,056.38	$12,301,692.27
Interest to Dec. 31, 1860...	393,516.63	28,346.98	365,169.65
Interest from Jan. 1, 1861..	25,985,675.31	2,056,792.78	23,928,882.53
	$39,637,940.59	$3,042,196.14	$36,595,744.45
2. Total Area— *36.1843%*			
Principal	$12,838,547.31	$926,724.99	$11,911,822.32
Interest to Dec. 31, 1860...	381,045.15	27,448.59	353,596.56
Interest from Jan. 1, 1861..	25,162,127.35	1,991,608.14	23,170,519.21
	$38,381,719.81	$2,945,781.72	$35,435,938.09

	West Virginia's Proportion of Debt, including holdings of Sinking Fund, Board of Public Works and Literary Fund.	West Virginia's Proportion of Bonds held by Sinking Fund, Board of Public Works and Literary Fund.	West Virginia's Proportion of Debt, excluding Bonds held by Sinking Fund, Board of Public Works and Literary Fund.
3. Assessed Valuation of Real Estate— *21.7812%*			
Principal	$7,728,185.06	$557,843.66	$7,170,341.40
Interest to Dec. 31, 1860...	229,370.77	16,522.73	212,848.04
Interest from Jan. 1, 1861..	15,146,384.67	1,198,851.81	13,947,532.86
	$23,103,940.50	$1,773,218.20	$21,330,722.30
4. Estimated Population, with Slaves— *24.5145%*			
Principal	$8,697,986.92	$627,846.87	$8,070,140.05
Interest to Dec. 31, 1860...	258,154.26	18,596.14	239,558.12
Interest from Jan. 1, 1861..	17,047,088.68	1,349,294.48	15,697,794.20
	$26,003,229.86	$1,995,737.49	$24,007,492.37
5 Estimated Population, without Slaves— *33.5231%*			
Principal	$11,894,327.24	$858,568.34	$11,035,758.90
Interest to Dec. 31, 1860...	353,020.91	25,429.86	327,591.05
Interest from Jan. 1, 1861..	23,281,267.49	1,814,840.54	21,466,426.95
	$35,528,615.64	$2,698,838.74	$32,829,776.90

The foregoing calculations are made by me from Joint Exhibits A1 and B1 of the Record and are certified correct.

ARTHUR G. POTTER.

FILE COPY.

Office Supreme Court, U. S.
FILED
DEC 30 1910
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

No. 2 Original. October Term, 1910.

NOTES OF ARGUMENT OF COUNSEL FOR COMPLAINANT.

In the Supreme Court of the United States.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

No. 3, Original. October Term, 1910.

NOTES OF ARGUMENT OF COUNSEL FOR COMPLAINANT.

PREFATORY NOTE.

ANATORY OF ARRANGEMENT OF THE RECORD AND OF REFERENCES MADE IN THE ARGUMENT.

The principal references in the argument of the case will be

1. The large volume of exhibits and evidence, returned by the er with his report, entitled "Record."
This will be referred to by pages, as follows, "R. 20," "R. 55,"

The tabulated statements or schedules which constitute a valu- part of that volume, and embody in a condensed form the most ortant data in the case, have been, for convenience, also printed bound together in a separate volume, where they will be found nged for ready reference according to the paging and order in h they appear in the larger volume, and can be readily ex- ed accordingly.

These schedules are designated "Plaintiff's and Defendant's ibit" "A-1," "B-1," etc.; or "Defendant's Exhibit" "D-1;" or ntiff's Exhibit" "E-3," etc. The great advantage of the method h, under the direction of the Master, was adopted in making up f the "Joint Exhibits," and some of the more important of intiff's Exhibits," and of "Defendant's Exhibits," comes from fact that in those exhibits, so certified by the accountants for parties, the *figures* stated are *agreed* figures,—the only ques- left open being as to the proper or legal application or use to ade of those agreed amounts in making up the respective ac- ts to which they relate.

These tabulated statements present in concrete form the claims ie opposing parties, and contain the very gist of the case.

It is important therefore to an intelligent understanding of numerous questions presented, to clearly understand the method oted by the Master for presenting the claims of the parties, re- tively, and the evidence in support thereof. A clear appre-

hension of this method can be had from a preliminary examination of the "Record," and the exhibits and schedules referred to, together with the master's report.

2. The Statutes, and extracts from Ordinances, and Constitutions of the two States, most material to the questions in the cause, have been compiled under the direction of the master in a separate volume, designated as "Appendix to the Record." This will be referred to as "App. p. 12, 26," etc.

3. West Virginia has caused two volumes to be compiled, printed and filed in the clerk's office of the Court, containing most of the record of the case down to the appointment of the Special Master; including also the arguments of counsel on the general hearings in this Court, and some papers and documents not a part of the record. The first volume of this compilation was edited by the Hon. Clarke W. May, the late attorney general of West Virginia; the second volume by Hon. W. G. Conley, the present attorney general of that State.

When for convenience this compilation is referred to it will be designated, "West Virginia's Compilation, Vol. 1," etc.

In the Supreme Court of the United States.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

No. 3, Original. October Term, 1910.

NOTES OF ARGUMENT OF COUNSEL FOR COMPLAINANT.

PRELIMINARY STATEMENT.

This suit is a result of the dismemberment of the Commonwealth of Virginia and the formation of the State of West Virginia out of her territory.

It is instituted for the purpose of having an accounting with West Virginia, and determining her equitable share of the indebtedness of the undivided Commonwealth.

That indebtedness,—independently of the bonds belonging to the sinking fund and the literary fund, held by the corporations known as the Commissioners of the Sinking Fund and the President and Directors of the Literary fund,—amounted to $33,897,073.82 on the 31st of December, 1860; of which $32,919,863.93 were principal, and $977,209.89 were accrued interest. The correctness of these figures is conceded by West Virginia.—See Master's Report, pages 1, 2, 3 and 29.

The specific relief sought by Virginia is to have West Virginia's equitable proportion of this common indebtedness fairly ascertained, and to secure the payment of the same by that State.

This large indebtedness—an enormous liability, having reference to the resources of the Commonwealth at the time it was contracted—came upon her with added force after the close of a long and disastrous war; but notwithstanding her impoverishment Virginia has, down to the present time, paid more than thirty-eight millions of dollars in interest, and has retired a considerable amount of the principal of the original debt, in addition to large payments made upon the portion of the debt, payment of which she has assumed and for which she has given er obligations. And yet there are some twenty-five millions of dollars of obligations, issued by Virginia as she exists to-day, outstanding and unpaid, upon which the interest is regularly met by the Commonwealth. So that Virginia has paid off and retired, or assumed and issued her own bonds for, over seventy-four millions of dollars, principal and interest, down to the present year, including the bonds which she has redeemed since 1865.

While the Commonwealth has made this large contribution to the payment of the principal and interest of the common debt, since the formation of the new State,—much of it made during the decades following the Civil War, at a painful sacrifice, from the scant means of an impoverished people,—West Virginia has not paid one dollar upon that common indebtedness, but has refused to pay, and denied her liability to pay, any part of the same. See Resolutions of West Virginia Legislature denying any liability for, and refusing to negotiate in reference to, the Virginia Debt.—App. 247, 248.

There is another fact which it is proper to call to mind in this connection:

The bulk of this large common debt was contracted with the sanction and by the votes of the representatives in the General Assembly of Virginia from the counties now constituting the State of West Virginia,—a large part of it having been actually put upon Virginia by the votes of those representatives over the votes

of a majority of the representatives of the counties constituting the Virginia of to-day; and but a small part of that indebtedness would have been contracted had the representatives from West Virginia counties in the General Assembly of Virginia opposed and voted against the Acts by virtue of which the debt was created.

These pregnant facts are specifically alleged in the complainant's bill, and are not denied or questioned in the defendant's answer.—See Paragraph III of the Bill, R. 4; and Paragraph III of the Defendant's Answer, R. 144.

It is also true that more than seven-eighths of the indebtedness of Virginia at the time of the formation of West Virginia was represented by equivalent sums expended on works of internal improvement, which were either designed, begun, and built for the purpose of penetrating and developing West Virginia territory, or are to-day parts of railway systems and lines of communication which serve the territory and people of West Virginia, and afford large regions of that State their best access to the Atlantic seaboard and to the markets of the world.—See Appendix I to this Note of Argument.

The foregoing statement of facts is made here, because they have an important bearing upon the broad equities of the case, and entitle Virginia to fair and just consideration in the application of rules of construction to the statutes, ordinances and provisions of constitutions which are relied upon as determining the rights and obligations of the parties.

They are tremendous facts, and have a mighty bearing upon questions which go to the very right of the cause.

This suit is brought by Virginia for her own protection and relief; and yet, to the extent that it shall result in her exoneration, it will inure to the benefit of the common creditors who have deposited their bonds in her keeping.

She actually to-day holds every bond which was issued by the Commonwealth prior to the formation of West Virginia, which is known to be in existence, and she also holds more than nine-tenths of the certificates which she issued to the common creditors of the two States, who confided those bonds to her keeping.—R. 102.

So that Virginia, and Virginia alone, has, and represents here every substantial right and interest, adverse to the defendant, in any way connected with the unsettled debt of the undivided State, or directly or indirectly involved in this suit.

Such are some of the more important facts which underlie this suit, and such generally are the relations of Virginia to, and her vital interests in, the litigation.

ARGUMENT.

There can be no question, as a principle of public law, public justice and public right, that, on the 20th day of June, 1863, when West Virginia became one of the States of the American Union, the public debt of Virginia, then existing, constituted, independently of any stipulation between Virginia and the new State, an equitable and a moral claim against the people and the property, both of West Virginia and Virginia; and that, as has been decided by the Supreme Court of Virginia in more than one case, and has been held by this court, both States, and the people of both States, were bound for the payment of those obligations.

Higginbotham v. *The Commonwealth*, 25 Gratt., 627;
Greenhow v. *Vashon*, 81 Va., 336;
Hartman v. *Greenhow*, 136 U. S., 672.

Independently of any convention between the two States, according to recognized authorities, the debt should have been ratably apportioned between the two States.

The entire debt of the Commonwealth was created in carrying out what was known as her "Internal Improvement Policy."

The history of that policy of Virginia, from its inception nearly a century ago until 1861 when it was rudely interrupted by war and revolution, will show that the enormous debt incurred by Virginia in carrying it out, was incurred mainly upon the expectation of the return which would reasonably come to the State and her people from the *prospective* enhancement of the values of real estate which would follow the development of the regions which those works of internal improvement, built in whole or in part by the money represented by the State debt, would create and stimulate.

That these expectations have been largely realized, though not always precisely, perhaps, in the way anticipated, is impressively shown by the remarkable increase of the assessed values of the real and personal property in the two States, and particularly in West Virginia, down to 1908, the latest year for which those facts are established in the cause.

As will be seen from Plaintiff's Exhibit E-3, R. 651, which is made up from the official records of the two States, the aggregate of the assessed values of the real estate, personal, and railroad property in West Virginia were

For 1867 (the first year for which the official figures could be obtained).....$126,060,743.00
For 1908 ..... 937,232,718.54

An increase of $811,171,975.54,
Or 643 per cent!!!

The assessed values of taxable property in Virginia for the same period advanced from.....$354,848,482.69, in 1867,
To ..... 661,796,631.00, in 1908,

An increase of.....$306,948,148.31,
Or about 84 per cent.

While this enormous difference in the increment of the assessed values of taxable property may doubtless be, in part, accounted for by the different standards of valuation adopted in the two States, by no means all of it is ascribable to that circumstance; and the facts and figures shown by the exhibit just referred to have an influential bearing upon the essential equity of the plaintiff's claim that to determine fairly the portion of the burden of the common debt which, as a matter of justice, should be borne by West Virginia, account should be taken of the great enhancement of values which have come to the territory which the internal improvements referred to were designed to develope and have in large measure created. The debt was contracted far

more in reliance upon future and prospective values, than upon the values existing at the date of its creation.

There were certain enactments and certain conventional agreements of the restored government of Virginia, at Wheeling, and the new State of West Virginia, which have to be considered in determining what the respective rights and liabilities of the parties are in the premises.

The first of these, was the so-called "Wheeling Ordinance," an ordinance adopted on the 20th day of August, 1861, by what purported to be a convention of the people of Virginia, "to provide for the formation of a new State out of a portion of the territory of this State."—(Appendix to the Record, pp. 119 to 122, inclusive).

The ninth section of that ordinance dealt with the debt and provided—

> "9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the same period."

That ordinance purported to be an enactment of Virginia alone. It prescribed, *upon its face*, an arbitrary and what would seem to be an inequitable basis of settlement.

In so far as it provided for the assumption by the new State of a "just proportion" of the debt of the Commonwealth, its language was free from objection. But when it came to indicate the manner in which that proportion should be ascertained, its terms were not only artificial, but *on their face*, inequitable.

And yet the dominant purpose of the enactment, expressed in the clearest terms, was to require the new State to assume a "just proportion" of the public debt of the Commonwealth prior to the first of January, 1861. Upon elementary principles of con-

struction this will be taken, certainly by a court of equity, to be its controlling purpose; and that intendment will not be suffered to be defeated by such a construction of the language of the ordinance as will lead to a result inconsistent with it, when that language can be sensibly, reasonably, and fairly construed and applied so as to operate in harmony with that expressed paramount purpose.

Fortunately, in the interest of justice, that was not the only enactment upon the subject.

There was a later, a more significant, and a more effective enactment by the legislature of the restored government of Virginia, accepting the provisions tendered by West Virginia, resulting in a compact between the two States, and creating a contractual relation governing both Commonwealths in reference to the settlement of their common debt.

These later enactments of the two States were—

First, that of West Virginia, embodied in the eighth section of the eighth article of the first Constitution of that State (Appendix to the Record, p. 125), which is as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

And, second, the act of the legislature of the restored government of Virginia, at Wheeling, passed May 13, 1862, giving the consent of the legislature of Virginia "to the formation and erection of the State of West Virginia within the jurisdiction of this State * * * * * under the provisions set forth in the constitution for the said State of West Virginia and schedule thereto annexed."—Appendix to the Record, p. 125.

Under section 3 of Article IV of the Constitution of the

United States the new State of West Virginia could not be formed without the consent of the legislature of Virginia.

That consent was given in this instance upon the terms, and in accordance with the provisions, set forth in the constitution adopted for the government of the new State, among the more important of which were the provisions and stipulations set forth in section 8 of Article VIII of that instrument, which required that the new State should assume "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first of January in the year one thousand eight hundred and sixty-one"; and that "the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years."

This proposal of the new Commonwealth, thus clearly expressed in its constitution, submitted to the legislature of Virginia and accepted by that legislature as one of the terms and conditions upon which it gave its consent to the partition of her territory and the erection of a new State out of that territory, and sanctioned by Congress, created a contractual relation between the old State and the new—a compact between them, which absolutely determined their rights, and which, whenever the provisions of the antecedent Wheeling ordinance shall come in conflict with the terms of such compact, shall prevail over the terms of that ordinance.

Now the insistence of Virginia has been, and is, that West Virginia should be charged with an equitable proportion of the debt, to be ascertained under the Wheeling Ordinance construed so as not to defeat the expressed controlling purpose of its enactment, and qualified and ruled by the provisions of Article VIII of the West Virginia Constitution, upon which the consent of the Legislature of Virginia and of the Congress of the United States to the formation of the new State, was predicated.

Agreeably to the decision of this court in its opinion, delivered by the late Chief Justice (R. 136), the view of Virginia is, and has been, that the Ordinance and the provisions of the West Virginia

Constitution should be read as being *in pari materia;* but that the constitutional provision, being the latest, must prevail, if, and whenever there is any conflict between them.

As a logical and inevitable consequence from this, the claim of Virginia was, and is, that, if the language of the Wheeling Ordinance is fairly and reasonably susceptible of such a construction as will, when fairly applied to the facts of the case, lead to an equitable result, and place upon West Virginia an equitable proportion of the debt, such construction should be given to that Ordinance; and that, if the language of the Ordinance is not reasonably and fairly susceptible of such a construction, then the Ordinance must be discarded, and the mandate of the West Virginia Constitution followed. And that, in any event, the provisions of that Constitution will govern in placing a contractual obligation upon West Virginia to pay an equitable portion of the common debt of the undivided State, and to pay interest upon the same from the date when that express contractual obligation accrued, until it shall have been discharged.

But the claim of Virginia was, and is, farther, that the provisions of the Wheeling Ordinance—fairly, justly and sensibly construed, and applied, according to its manifest purpose—places upon West Virginia a just and equitable proportion of the debt; *and that West Virginia cannot be heard to repudiate this result of her own express covenant and promise.*

On the other hand, West Virginia has insisted, and still contends, that there is no obligation upon that State to pay any part of the Virginia debt; but that, if there is any liability whatever upon West Virginia, it is a liability for a settlement and accounting which must be made under a construction of the language of the Ordinance, which would absolutely defeat its declared purpose, and, instead of placing a just proportion, or any proportion, of the debt upon West Virginia, would actually, as was contended for West Virginia, bring Virginia in debt to West Virginia.

With the issues thus made up, this court, in order to place in its possession the data necessary to enable it to intelligently and fairly decide the case, referred the cause to Special Master Charles

Littlefield, by its decree of reference, entered on the 4th of May, 8, and directed the Master to take and report to the court seven arate accounts set forth in seven paragraphs of the decree.— 173, 174, 175 and 207.

After considering a great mass of testimony, statements, and ounts prepared by the accomplished expert accountants em- yed by the parties, respectively, and the elaborate arguments of nsel, and after a laborious and painstaking investigation and sideration of the case, the Master, on the 17th of March last, d his report, in which he returns his findings upon each of the en inquiries submitted to him, and with great fairness and at ability presents the grounds upon which those findings are ed.

The cause is now submitted for final adjudication.

It comes before the court upon the pleadings and papers form- y considered by the court, upon the decisions and decrees here- ore rendered in the cause, and upon the Master's report, together h the evidence returned therewith and referred to therein, and on the exceptions filed by the parties to that report.

Your Honors must have been already impressed with the fact t it is a cause of as much complexity as any which has ever ne before you for decision, and with the novelty and difficulty some of the problems which it presents.

Much of what appears at the threshold to be complex will appear upon a careful examination of the bill and answer, the section of the Wheeling Ordinance, the 8th section of Article II of West Virginia's Constitution of 1862-3, the decisions and crees heretofore rendered in the cause, and the tabulated state- nts or accounts, the figures in which have, in almost every in- nce, been assented to by both parties.

Still a painstaking consideration of the Master's report, and the exhibits and evidence referred to therein and in the argu- nts of counsel, will be necessary to any fair understanding of e issues in the cause, and to their decision according to the very ght of the case.

We have, therefore, to crave the patient and indulgent attention of the court to a somewhat detailed and tedious discussion of the facts, figures, and principles upon which a righteous decision of the cause depends.

The chief points of difference are sharply presented by such of the exceptions to the Master's report as are specifically relied upon by the parties respectively, and by the "Joint Exhibits" or accounts which exhibit their opposing claims in contrast.

Upon the great majority of these the Master's findings are, and are shown by him to be, so plainly right that further discussion of them is rendered needless.

After full consideration, however, the counsel for Virginia deem it to be their duty, upon the case as it is presented, to earnestly urge objections to a few of the Master's conclusions, in reaching which we are persuaded that he is in manifest error. But it is our purpose to urge no objection to his report which rests upon a proposition which can be fairly regarded as debatable.

I.

The first paragraph of the decree directed the Master to ascertain and report to the court:

> "1. The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness."

In the view which we take of this branch of the case and for the principal purposes of our argument it will be only necessary to consider the amount of the public debt of the Commonwealth outstanding on the 31st of December, 1860, in the hands of the general public.

Fortunately there is no controversy as to the amount of that indebtedness then so outstanding.

As ascertained by the Master, the amount of that indebtedness is, as fixed by the records of the Commonwealth, as follows:

Aggregate amount of old Virginia debt in the hands of the general public January 1, 1861:

Amount bearing 6 per cent. interest	$30,842,659.43
Amount bearing 5 per cent. interest	2,077,204.50
Interest on 6 per cent. outstanding debt from July 1st to Dec. 31st, 1860	925,279.78
Interest on 5 per cent. outstanding debt from July 1st to Dec. 31st, 1860	51,930.11
Total outstanding indebtedness	$33,897,073.82

See "Plaintiff's and Defendant's Joint Exhibit A-1." R. 215, and Master's Report, pp. 1, 2 and 29.

The authority of law by which, the purposes for which, that indebtedness was contracted, and the dates and nature of the bonds or evidences thereof, are shown by the references and entries upon "Plaintiff's and Defendant's Joint Exhibit A-1;" by the copies of the bonds and certificates of indebtedness issued for much the greater part thereof—"Plaintiff's Exhibit A-2," R. 219 to 285; by the abstract of the statutes in reference to the State debt and the appropriation of the avails thereof to works of internal improvement—"Plaintiff's General Exhibit I," R. 900 to 988; and by other evidence in the case; none of which are any longer matters of controversy.

The only controverted questions which have arisen under this branch of the case have been in respect to the inclusion or exclusion of the sinking fund and the literary fund from the statement of the debt.

As to the sinking fund, frankness compels us to say that we are convinced that the finding of the Master in reference thereto is right.

As to the literary fund, we are content to rely upon the complainant's first exception to the Master's report.

II.

The second paragraph of the decree required the ascertainment of—

> "2. The extent and assessed valuation of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately."

The figures as to the area and assessed valuation of the real estate embraced in the territory of the two States, respectively, and as to the population thereof, with and without slaves, having been taken from authentic public records of the United States and of Virginia, incorporated in "Plaintiff's and Defendant's Joint Exhibit B-1," the agreed statement prepared by the expert accountants of the parties,—those figures have been adopted by the Master and made the basis of his findings under this paragraph of the decree.

We are unable to conjecture how these figures, thus authoritatively established and adopted, or the results deducible therefrom, can now be brought in question. R. 366, 367.

The figures furnished for West Virginia in "Supplemental Exhibit 7," and now relied upon by that State would be more advantageous to Virginia than those adopted by the Master, for the reason that the assessed valuation of the real estate embraced in the State of West Virginia, as given by that exhibit, is larger and the assessed valuation of the territory of Virginia is less than that adopted by the Master, taken from the assessments of Virginia. The figures submitted by West Virginia would make her share of the debt, on the basis of assessed valuation of real estate in the two States, $154,166.09 more than she would owe under the master's findings. But we are content to accept the values adopted by the Master, because we are satisfied that they are correct.

PARAGRAPH II.

The Master's findings under this head are as follows:

The Extent and Assessed Valuation of the Territory of Virginia and of West Virginia June 20th, 1863, and the Population Thereof, with and without Slaves, Separately.

PARAGRAPH II OF DECREE.

1. EXTENT:

Land Area

Virginia	40,262 Square Miles =	62.6314%
West Virginia	24,022 Square Miles =	37.3686%
Total	64,284 Square Miles =	100%

Total Area:

Virginia	42,627 Square Miles =	63.8157%
West Virginia	24,170 Square Miles =	36.1843%
Total	66,797 Square Miles =	100%

2. ASSESSED VALUATION:

Real Estate:

Virginia	$296,085,460.31 =	78.2188%
West Virginia	82,449,252.04 =	21.7812%
Total	$378,534,712.35 =	100%

3. POPULATION:

Estimated—With Slaves:

Virginia	1,221,319 =	75.4855%
West Virginia	396,633 =	24.5145%
Total	1,617,952 =	100%

Estimated—Without Slaves:

Virginia	748,171 =	66.4769%
West Virginia	377,289 =	33.5231%
Total	1,125,460 =	100%

III.

The third account directed by the decree is one ascertaining—

> "3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."

This is one of the accounts which is called for under section 9 of the Wheeling Ordinance, which requires that in order to ascertain the proportion of the debt which the new State shall take upon itself, that State shall be charged with "all State expenditures within the limits thereof * * * * * since any part of said debt was contracted."

The divergent contentions of the parties are shown by the tabulated statements embodied in "Plaintiff's and Defendant's Joint Exhibit C-1," pp. 1 to 6, R. 371-377.

The total of said State expenditures in the territory constituting West Virginia, as shown by plaintiff's statements of this account (R. 371) was	$5,639,302.66
As shown by defendants' statements	1,251,288.92
Difference in the two results is	$4,388,013.74

In considering the questions which are presented by the controverted items in the schedules filed under this paragraph, it is important always to bear in mind the precise language of the decree, which, following the terms of the Wheeling Ordinance, directs the ascertainment of:

> "*ALL expenditures* made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia, since any part of the debt was contracted."

It is manifest that that language in explicit and comprehensive terms, embraces, without exception or qualification, all expen-

ditures of whatever character or description, and on whatever account, or for whatever purpose, or in whatever manner made, which were made by the Commonwealth of Virginia in any part of the territory now constituting West Virginia, after March 19, 1823, the agreed time at which any part of the debt in question was contracted.

The only questions to be considered, therefore, in determining whether any particular expenditure made during that period should be charged against West Virginia, are: First, Was it made by the Commonwealth? and, Second, Was the money expended in West Virginia?

Now, governed by these plain requirements of the decree, the accountants engaged on behalf of Virginia have embraced in this account all such items of expenditure, and only such items of expenditure, as were made by the Commonwealth within the territory of the new State during the period stated.

To a number of these items of charge counsel for West Virginia make objection, not on the ground that the expenditures they challenge were not made, or were not made in West Virginia territory, but in some instances because of the manner in which the expenditures were made; in others because of the character of the particular expenditure, or the purpose for which it was made; and in other cases, as for instance the expenditures made in West Virginia on the Covington & Ohio Railroad, and upon the Berryville and Charlestown Turnpike, upon the ground that Virginia has, since these several expenditures were made, in some way, by acts or transactions in reference to these subjects, lost her right to embrace those items of expenditure in this account.

As appears from Joint Exhibit "C-1," R. 371, the charges upon this account allowed by the accountants for plaintiff, and excepted to by the defendant, are classified as follows:

Items of Plaintiff's Charges Excepted to by West Virginia:

Expenditures in W. Va. upon railroads	$1,316,992.42
Expenditures in W. Va. upon turnpikes	430,252.89
Miscellaneous expenditures in W. Va	1,154,000.10
*Expenditures in bridges, river improvements, banks owned by joint stock companies, and loan to Town of Bath	1,486,768.33
	$4,388,013.74

We will consider these in the order in which they are stated in Exhibit "C-1," and are considered by the Master.

1. The expenditures upon railroads which West Virginia questions, are—

Expenditures on the Covington & Ohio R. R.	$1,146,460.42
Expenditures on the Winchester & Pot. R. R.	170,532.00
	$1,316,992.42

(1) The expenditures upon the Covington & Ohio R. R. This item of $1,146,460.42, is allowed by the master.

The Master very clearly shows the propriety of this item of charge, and little if anything need be said in support of his conclusion.

There is no question that those expenditures were made by the Commonwealth "since any part of the debt was created;" nor that they were made "within the territory now constituting the State of West Virginia."

But opposing counsel claim that in some way Virginia has lost her right to have those expenditures charged against West Virginia by reason of the public acts and transactions of Virginia and West Virginia in reference to this railroad. This ob-

NOTE:—The charge under this paragraph for amounts invested in Bank Stocks is withdrawn, as those stocks should be accounted for under Paragraph VII. and have been allowed by the Master under that Paragraph.

jection has been stated so vaguely that we are at a loss to know upon what ground it is based.

The Covington & Ohio Railroad was owned and built by the Commonwealth under the Acts of February 15, 1853; March 13, 1856; March 20, 1858, and February 29, 1860. (Appendix 33, 34.) The work was unfinished at the time of the formation of the State of West Virginia, though over $2,787,000.00 had been then spent upon it.

How West Virginia should account for that property and the expenditures which it represented, was distinctly prescribed by section 9 of the Wheeling Ordinance (App. 119, 122), and was prescribed nowhere else.

After June 20, 1863, West Virginia owned the portion of the Covington & Ohio Railroad in that State as completely as Virginia owned the portion of that road within her limits.

As is shown by the subsequent legislation of the two States both States were very anxious to secure the completion of that railroad from its intersection with what was then known as the Virginia Central Railroad at Covington, Virginia, to a point on the Ohio river, thus giving a through railroad connection from Richmond, Virginia, through the entire State of West Virginia to the Ohio river, at the mouth of the Big Sandy, or at the mouth of the Great Kanawha, with the right to build to both points.

Both States were, as is shown by that legislation, willing to give to the company which should complete that through line of railway, the right of way and property of each State, respectively, in the parts of the unfinished road located in each State, and the benefit of the large expenditures made in its partial construction. Virginia, though very little of the proposed new railway would be within her limits, made still more liberal concessions to the builders of the through road, in reference to the sale to the new company of the Blue Ridge Railroad wholly within Virginia, and to the sale of the stock of Virginia in the Central R. R. Co., and to the settlement of the indebtedness of the Central R. R. Co. to Virginia.

To effectuate the purposes of the two States, concurrent Acts

were enacted by their respective Legislatures for the incorporation of the Covington & Ohio Railroad Company, passed by Virginia February 26, 1866, (Appendix 35), and by West Virginia March 1, 1866, (Appendix 37), and to authorize the consolidation of the Covington & Ohio Railroad Company with the Virginia Central Railroad Company and other companies, and the formation of the Chesapeake & Ohio Railroad Company for the purpose of completing "a continuous line or lines of railroad from the waters of the Chesapeake to the Ohio river," passed by West Virginia February 26, 1867, (Appendix 40), and by Virginia March 1, 1867, (Appendix 43.)* See also section 9 of Act of Virginia Feb. 26, 1866 (App. 36), and section 9 of Act of West Virginia March 1, 1866 (App. 39.)

It will be seen that the interests which West Virginia had in the building of the proposed railroad were far greater and more vital than those of Virginia.

West Virginia at that time had no railroad within her limits, except the Pennsylvania across the Pan Handle, and the Baltimore & Ohio through the northern portion of that State.

The New river and Kanawha valleys, and the entire southern portion of West Virginia, were without a mile of railroad, and large parts of those sections were inaccessible to the outside world by any practicable line of communication.

The enterprising young State accordingly freely donated all the property rights which she had in the Covington & Ohio Railroad, situated within her limits, to the builders of that railroad, just as the older State, in larger degree, contributed even more generously to the same important object.

The legislation of the two States upon this subject, printed in the Appendix, pp. 35 to 49, will be read in vain to discover any provision which can be so wrested as to be construed to refer in any way to the liability of West Virginia to pay some part of the

*By Act of January 26, 1870, the Legislature of West Virginia amended the charter of the Chesapeake and Ohio R. R. Co., and confirmed the contract made by the commissioners on behalf of the two States with the Virginia Central R. R. Co., under authority already granted by Virginia, by the Act of February 26, 1866 (Appendix p. 35-36) and by West Virginia by Act of March 1, 1866 (App. 37-39 and 46.)

Virginia debt, or to release that State from any part of that liability.

Those concurrent enactments can be construed to do only what they did do, that is, to give the consent of the two States to the establishment of, and by their respective grants to secure, a through line of railway from the waters of the Chesapeake to the banks of the Ohio, and to grant the property rights of each State in and to the portion of the respective railroads situated in each State, to the consolidated company, for that purpose.

The Wheeling Ordinance prescribed the basis on which the proportion of the Virginia debt to be assumed by West Virginia was to be ascertained, and vested in the new State the ownership of the portion of the Covington & Ohio Railroad located in West Virginia, and there is not a line or a syllable of those concurrent Acts of the two States in reference to the Chesapeake & Ohio Railroad, which can be construed to repeal or to modify the provisions of that Ordinance.

It would require a far-off and capricious flight of the imagination to construe the language of those concurrent Acts so as to make them operate to prevent Virginia, when she comes to have a settlement with West Virginia as to the part of the common debt which West Virginia should pay, from insisting that West Virginia should, according to her own agreement, be charged in making up that account with the amount expended upon the Covington & Ohio Railroad within the limits of the new State, if the Wheeling Ordinance is to control to any extent in that accounting.

There is nothing in any of those concurrent Acts of the two States to suggest that either State was conceding anything to the other. Both were conceding a great deal to the Covington & Ohio and to the Chesapeake & Ohio Railroad Companies, and for obvious reasons.

The account of this matter, as claimed by the plaintiff and found by the Master, is distinctly responsive to the decree.

That claimed by the defendant would not satisfy the decree, and cannot be set up without going counter to both the decree and the Ordinance.

(2) The expenditures upon the Winchester & Potomac Railroad in West Virginia.....$170,532.00.

The Master rejected this item of charge—15/27th of it because it was a loan by Virginia to the railroad company, and 12/27ths of it because it was, in his view, an investment made by the State in the shares of the capital stock of this Company.—Master's Rep. 47; Joint Exhibit C-1, p. 2; R. 373.

We cannot be unmindful of the fact that there are circumstances connected with Virginia's dealings with the Winchester & Potomac Railroad Company, which sharply differentiate any charge on account of her expenditures in West Virginia upon that railroad from the other expenditures made by the Commonwealth in building works in West Virginia territory, which were built through internal improvement companies.

We are constrained to admit that the circumstance that Virginia commuted all of her claim against, and interest in, that company under the Act of February 24, 1846 (App. 30, 31), gives West Virginia a strong equity to have that charge eliminated from the account, even though it be true that the transaction was not consummated and Virginia was not paid the commuted price, until after the formation of the new State.

We, therefore, beg leave to withdraw our objection to the disallowance by the Master of this item of Virginia's claim.

We do not, however, at all assent to the reasons upon which, in part, the Master bases his rejection of so much of this item as was represented by the shares of stock which Virginia received therefor.

We will consider those grounds under the next head, when we come to discuss the question presented distinctly, as it is there, free from other complications, in connection with the large expenditures made by the Commonwealth through internal improvement companies, in building roads, turnpikes and bridges, etc., upon West Virginia soil.

(3) *Expenditures made by Virginia in West Virginia territory in the construction of works of internal improvement*

located in West Virginia but built through the agency of joint stock companies.

Passing over a number of items under this paragraph of the decree, as to which the findings of the Master, in so far as they are in favor of the contention of the plaintiff, afford no just ground of objection to the defendant, for the reasons clearly shown by the Master, the only items of charge against West Virginia under that paragraph of the decree, to the disallowance of which we deem it our duty to object, are the items specifically stated in complainant's second exception, as follows:

(1) For Bridges: Expenditures made by Virginia upon bridges in West Virginia territory, built by joint stock companies, owned partly by the Commonwealth—Items 57 to 65, inclusive, of Joint Exhibit C-1, p. 4; R. 375; Special Master's Report, p. 85—aggregating		$ 78,412.50
(2) Expenditures made by Virginia in the improvement of the navigation of West Virginia rivers by joint stock companies—Items 66 to 69, inclusive, of Joint Exhibit, C-1, p. 4; R. 375; Special Master's Report, p. 85—aggregating		$ 210,500.00
(3) Expenditures made by Virginia upon turnpikes wholly in West Virginia territory, built by joint stock companies:		
(a) On Charlestown & Berryville turnpike, in West Virginia—Item No. 6 of Joint Exhibit, C-1, p. 2; R. 373; Special Master's Report, pp. 64, 84	$ 11,932.52	
(b) On turnpikes and roads mentioned in Items 70 to 147, inclusive, of Joint Exhibit,		

C-1, pp. 4, 5 and 6; R. 375, 376 and 377; Special Master's Report, pp. 78, 79 and 85....	803,555.83	
Total expenditures made by Virginia, through joint stock companies, on turnpikes and roads in West Virginia territory.....	$815,488.35	815,488.35
Total aggregate of items, the disallowance of which is here excepted to		$ 1,104,400.85

This exception raises one of the most important questions in the case under the Wheeling Ordinance and the provisions of the first Constitution of West Virginia as it involves $1,104,400.85, principal sum, of the amount of the debt to be assigned to West Virginia.

With the utmost deference for the ability, learning, and fairness of the Master, we are convinced that he erred in his rejection of these items of the account against West Virginia.

We believe that there is no question as to the propriety of their being charged against West Virginia under Paragraph III of the Decree and under the language of the Wheeling Ordinance. If we fail to demonstrate this, it will be because of our inability to fairly present to the minds of the court the facts and considerations which should control in the decision of the question.

The principal grounds upon which this objection to the Master's finding is based are concisely stated in the formal exception taken thereto.—See Complainant's Exceptions, pp. 4 and 5.

The material facts as to all of these expenditures are, for the purpose of this inquiry, substantially the same, and the same principles should control in determining the proper disposition to be made of these items, in the accounting.

The money appropriated by the Commonwealth in each instance was unquestionably expended in West Virginia territory; for all of these improvements were physically located in West Virginia counties.

The chief ground relied on for excluding these items from the debit account against West Virginia is, *because of the manner in which the expenditures were made;* that is, because they were not made by the State directly through the hands of her own officers or immediate employees, but were made by the State indirectly through the medium of joint stock companies; that they were not made upon bridges, locks, dams and other improvements in rivers, and upon turnpikes, wholly owned by the State, but upon such works of internal improvement as were only partly owned by the State.

The works and highways upon which these expenditures were made in every instance had their situs in West Virginia, and the State money appropriated to them was expended in West Virginia.

The chief difference between these expenditures and those made directly by the State through its own officers and employees, which are conceded by the defendant to be proper charges under this head, was, that in the one case the State received a certificate of stock in a joint stock company (which stock usually proved valueless), as the representative of the expenditure, while in the other case the State would receive merely a receipt or voucher from her officers as an evidence of the outlay.

In either case the Commonwealth, and West Virginia as her successor, received the benefit of the bridge, improvement of navigation, or turnpike on which the State money had been expended; and it is manifest from the history of these public works that the benefits which it was hoped that the public would derive from their construction generally constituted the chief inducement and consideration both to the public and to private investors.

There can be no question that any expenditure made by Virginia, by her several and independent acts, upon any work of internal improvement, or other object, in West Virginia, during the defined period, is a proper and necessary charge against West Virginia under the terms of the 3rd paragraph of the decree, and under the Wheeling Ordinance.

This is conceded by the counsel for West Virginia.

Now, it is equally clear that any such expenditure made by Virginia in association, or in partnership, with other corporations or individuals, would be also a proper and necessary charge against West Virginia under the decree and Ordinance.

Here, in a number of cases, Virginia, instead of going into an ordinary partnership with her associates in the various enterprises in question, chose to form a limited liability company to do the same thing which could have been effected by an ordinary partnership: for a joint stock company is, in law, and in fact, nothing more than a limited liability company.

In the country from which we so largely derive our institutions and our laws, they are termed "limited liability companies."

How can it be even plausibly contended that, because Virginia, for obvious considerations of convenience and public interest, chose to expend her input in these public improvements and other enterprises in West Virginia territory, through the medium or agency of a limited liability company, such expenditure is any less an expenditure by the State than it would have been had it been made through an unlimited liability partnership?

There is no qualification of the expenditures which are to be charged, such as counsel for West Virginia have had to attempt to make, either in the decree or in the Ordinance. The words "direct" and "indirect" are not found in either decree or Ordinance. No such classification is justified by the language of either the decree or the Ordinance.

Opposing counsel are forced by the stress of their case to interpolate the word "direct" both in the decree, and in the Ordinance, an interpolation which, while deemed necessary for the purposes of their argument, is absolutely unwarranted by the decree or by the Ordinance.

But even if that word were in the decree and Ordinance, it would not justify their contention; for an expenditure such as the State made in the improvement of Coal river, or upon the Huntersville and Parkersburg Road, or upon any one of the turnpikes and roads built partly by State aid, was a *direct* expenditure by the State, though paid, for the purpose of building the road or

other internal improvement, to the treasurer of a corporation having its domicile and situs in West Virginia territory.

It is a conclusive answer to all of these objections to these items of expenditure that the account directed by paragraph 3 of the decree is not limited to such expenditures as were made directly by the State; nor to expenditures made upon bridges, locks, dams, and sluices, and upon turnpikes wholly owned by the State; nor to expenditures for which the State received no return, nominal or otherwise, in the shape of shares of stock. That account is required by the decree to include "*all expenditures* made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."

The question considered by the Master, and which he has decided in the negative, is, as stated by him:

"Whether the subscribing and paying for stock in an internal improvement company, whose improvements were located within the limits of West Virginia, was 'an expenditure made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia' etc."? (See Master's Report, p. 47.)

With the utmost deference, that is not an accurate statement of the question presented here.

The exact question is:

Whether the expenditures made by Virginia in works of internal improvement physically located in West Virginia lost their character as State expenditures in that territory, because those works were built by joint stock companies formed by Virginia and individuals and corporations for the purpose of building those very turnpikes, roads, bridges, &c., and the Commonwealth received stock of such companies for the money so expended by her through them upon said works?

The history of the internal improvement system, and of the legislation of Virginia in regard thereto, as shown by the records and statutes of the Commonwealth, significant portions of which are referred to by the Master in his discussion of this subject at pages 47 to 55 of his report, will show, beyond controversy, that the paramount and controlling motive of the Commonwealth in all

these expenditures of money upon works of internal improvement was, not any direct or pecuniary return for the money expended in the shape of dividends or interest thereon, but was the advancement of the local and general interests of the people by the development of the resources of the Commonwealth, and of the facilities and lines of communication between the different sections of the State and the markets of the country.

It was the "public utility" which would be served by the construction of these works of internal improvement which the General Assembly had in mind, and not the return which might be expected in the shape of dividends upon the stock which was issued for these investments.

This will be apparent from reading the extracts from the public records of the Commonwealth, which show the purpose, policy, and motive of Virginia in expending her money on works of internal improvement, built by internal improvement companies, printed with this Note of Argument as Appendix II.

Noticing further one of the grounds chiefly relied upon for the exclusion of these items of expenditure, namely, that the expenditures were "investments" made by the State with a view to realizing some profit from them, we would say: That, while it was true that the hope of ultimate financial gain, or of some profitable return from the investment, was in some instances at least one of the inducements which led Virginia to make those expenditures in works built through the agency of joint stock companies, that was in no instance the dominant or controlling motive.

But, if the hope of ultimate financial gain constitutes any reason for excluding these public expenditures from the debit account against West Virginia, then there are few, if any, of the expenditures, which were made by Virginia in West Virginia counties which would not, by the same token, be excluded upon the same ground.

There were, and in the nature of things there would necessarily be, very few, if any, expenditures made by the State of the character indicated, which were not, or would not be, made in

whole or in part in the hope that they would not prove absolutely unprofitable.

The fact is that nearly the whole of the expenditures admitted by West Virginia to have been properly chargeable under this item, amounting to $1,251,288.92, were expenditures made in part with a view to the direct profits which it was hoped would be realized by the State from them in the shape of tolls or other income from the works thus constructed, as well as the anticipated indirect profits from the development of the territory which those works of internal improvement would serve.

For example, of the expenditures made by Virginia on turnpikes and roads in West Virginia, which are admitted by the defendant, there were expended—

On the Northwestern turnpike	$469,148.53,
And on the Staunton & Parkersburg turnpike	264,043.07,
Or	$733,191.60,

of the total admitted items of $859,050.92.—See Plaintiff's and Defendant's "Joint Exhibit C-1, p. 2," R. 373.

Now it will be found that Virginia actually derived in tolls from these two investments the following sums:

From the Northwestern turnpike	$126,339.89
From the Staunton & Parkersburg turnpike	17,080.71
Or a total of	$143,420.60

See Plaintiff's and Defendant's Joint Exhibit F-1, R. 805.

So we see that, of the two grounds of objection to the allowance of these charges against West Virginia:

(1) that the expenditure may be regarded as an investment made by the State, or,

(2) that anticipated profits or income may have been a motive for the expenditure, neither constitutes any just criterion or ground for either the allowance or rejection of such expenditures.

The fact is, undoubtedly, that every dollar expended by Virginia in works of internal improvement was an "*investment.*"

Another pregnant fact is also unquestionably established by the record in this case, that by far the greater part of the money thus expended was expended in the hope of some direct return from the investment; and that every dollar that was expended was expended with the expectation of some indirect, ulterior, or ultimate return through the improvement and development of the territory in which the several works of internal improvement were constructed.

It is also true beyond a doubt that nearly all of these investments made by the Commonwealth in West Virginia territory, whether made in works wholly owned by the State, or made in works owned by the State in conjunction with other stockholders, proved, so far as dividends or direct earnings were concerned absolutely unprofitable and unremunerative; and that some of the investments made by the State in works wholly owned by the State proved more remunerative than the expenditures made through the agency of joint stock companies in the construction of similar works of internal improvement.*

It is a significant fact that the view which is here urged as to the expenditures of the Commonwealth in works of internal improvement constructed in West Virginia territory and as to the classification of such of those expenditures as were made through the media, or agency, of joint stock companies is the view heretofore consistently taken by the representatives of West Virginia most familiar with the subject.

The eminent citizens of that State who constituted the Debt Commission appointed by the Governor of West Virginia pursuant to the resolutions adopted by the Legislature of that State

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NOTE:—It is an important circumstance in this connection that every expenditure made by the State on internal improvements whether built by the State or by joint stock companies, was, by the terms of the Act of February 5, 1816, and he Acts amendatory thereof, made exclusively for the purpose of building such works. Any earning or profit received from any such investment went into the Internal Improvement Fund, to be there used for building other internal improvements. So that the only hope of gain or profit, which actuated Virginia in making all of these expenditures or investmens, was to provide money to build roads, bridges, turnpikes and railroads to which every dollar thus received was dedicated.

See Appendix II, to this note of argument.

February 15th and 20th, 1871, in the elaborate report made by them on the 7th of August, 1871, reviewing the entire subject of West Virginia's liability for a portion of the Virginia debt, found that the expenditures made by Virginia in the construction of turnpikes and bridges, and in the improvement of rivers, built or improved by joint stock companies, were properly chargeable against West Virginia under the Wheeling Ordinance in like manner as were expenditures on roads constructed wholly on the State account.

Accordingly we find that in their report they charge West Virginia with $3,343,929.29 "for amounts expended and invested in her territory," the items of which they state in detail in Statement "F," exhibited as part of their report, which sum and the items of which it consists include large amounts expended in West Virginia through the medium of joint stock companies, as will be seen by an examination of that exhibit.—See Report of West Virginia's Debt Commission, West Virginia's Compilation of the record of *Virginia* v. *West Virginia*, Vol. 1, pages 471, 472, and Statement "F," 479 to 486, filed by the defendant in the clerk's office of this court.

The gentlemen composing that Commission were J. J. Jackson, J. M. Bennett, and A. W. Campbell. Mr. Bennett had been the first auditor of Virginia from 1857 to 1865. Messrs. Campbell and Jackson were active participants in the movement for the formation of the new State of West Virginia. Gen. Jackson was a member of the Wheeling Convention, and Mr. Campbell was one of the leaders throughout the movement for the establishment of the new State. They were doubtless familiar with the inside as well as with the outside of that transaction, and with the true intent and meaning of the Wheeling Ordinance.

There are some very large errors of omission in Statement "F," and patent errors on the face of their report; but still it serves a valuable purpose in showing what was the construction placed upon the Wheeling Ordinance in this regard by these very intelligent representatives of West Virginia in the very earliest stage of

this controversy,—at a time when most of the framers of that Ordinance were still alive.

Two years later, in December, 1873, a Committee of the Senate of West Virginia, of which Mr. J. M. Bennett was the chairman, came to again review the question of West Virginia's liability for the debt of Virginia.

In a carefully considered report, dated December 22, 1873, that committee unanimously adopted the figures above given as to the amount expended by Virginia in West Virginia territory and which they conceded to have been "contributed to the development of the territory of West Virginia."

This last mentioned report is printed as Exhibit No. 3 with the Answer of the Defendant, R. 166, 167, 168, 169.

When, years afterwards, West Virginia was urging the payment of her claim against the United States for the refunding of the direct tax, which was being withheld because the United States held certain bonds of the old State for the payment of which it was claimed that West Virginia was liable, Messrs. Alfred Caldwell, formerly attorney general, and E. W. Wilson, former Governor of West Virginia, in their brief filed before the attorney general of the United States again adopted the construction of the Wheeling Ordinance previously approved by the West Virginia Debt Commission, and by the Finance Committee of the Senate of West Virginia.——See quotation from brief of Messrs. Caldwell and Wilson, printed as Appendix No. III to this Note of Argument.

This construction of the Wheeling Ordinance in respect to the expenditures made by the Commonwealth of Virginia through the agency of joint stock companies in the territory of West Virginia adopted by the representatives, public officials and eminent citizens of West Virginia most familiar with the subject remained unchallenged for more than a generation, until after this suit was instituted, when a new and strange light seems to have dawned upon the representatives of that resourceful State, and for the first time in all the long agitation and discussion of this subject a new, and we respectfully submit, a forced and unnatural, con-

struction is attempted to be placed upon the Wheeling Ordinance, so as to limit the amount for which West Virginia is to be charged on account of expenditures made by Virginia in West Virginia territory, so that the account shall not embrace "ALL EXPENDITURES," but so that it shall include only a portion, and much the smaller portion, of those expenditures.

The decree requires the Master to report ALL expenditures—but the Master distinguishes between expenditures, classifying them as "direct" and "indirect," and construes the decree and the Wheeling Ordinance as referring to expenditures made by the State through its officials, which he classifies as "direct" expenditures and as excluding expenditures made by the State through the agency of joint stock companies, which he classifies as "indirect" expenditures; and he states the following reasons for his finding:

> "To hold these subscriptions thus made for investment to be expenditures by the State 'within the territory' it would be necessary to read into the decree the words 'either directly or indirectly' which I do not feel at liberty to do." Master's R. 62.

The language of the decree and of the Ordinance is explicit, and we agree that the Master was not at liberty to read anything into either; but in order to support the conclusion he has reached he has been obliged to read into the decree the word "direct," and by construction to hold that the court and the Wheeling convention when they used the word "All" meant something less than all; that they meant by "all" expenditures only such as the Master has classified as "direct."

We submit that this construction is not warranted, and that there is no authority for the Master under the language of the decree, which requires a report of ALL expenditures, to classify expenditures as "direct" and "indirect" and allow only such as he classifies as "direct." The effect of the Master's construction is to read out of the decree the word "ALL" and substitute for it the word "direct:" and then to give to that substituted word a narrow meaning not justified by the facts and circumstances of the case.

Summary.

The Master has allowed under this paragraph of the decree as proper charges against West Virginia, items amounting to $2,811,559.98

To this we are convinced that there should, beyond peradventure, be added, for expenditures made by Virginia in bridges, improvement of rivers, turnpikes and roads, through the agency of joint stock companies organized by Virginia for that purpose, the items mentioned in the tabulated statement on pages 28 and 29 of this Note of Argument, aggregating..... 1,104,400.85

Giving a total of State expenditures in West Virginia—the aggregate amount chargeable against West Virginia under Paragraph III of the Decree..... $3,915,960.83

See Master's Report, pp. 47 and 83; R. 399, 401, 433, 459, 478, 488 and 512.

The findings of the Master as to the other items passed upon by him in response to the third paragraph of the decree, and not here specifically objected to by counsel for the complainant, are, we think, in the main shown to be correct upon the face of his report, and by the evidence in the cause, and are accepted on behalf of the complainant.

IV.

The fourth paragraph of the decree directs the ascertainment of—

> "4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States."

The differences in the computation of the total ordinary expenses of the State government between March 19, 1823, and January 1, 1861, as stated by the Master, and as claimed by the defendant, arise entirely from the difference in the classification of the several items of State expenditures during the prescribed period.

The defendant has so classified the greater part of these expenditures as to exclude them from this account. The Master has treated most of the State expenditures during that period as being ordinary, and has included them.

This inquiry is manifestly predicated upon the language of the Wheeling Ordinance, which provides that the new State shall be charged with "a just proportion of the ordinary expense of the State government since any part of said debt was contracted."—R. 6.

The decision of the issue thus presented turns upon the meaning which those words carry in that connection; and their correct interpretation is necessary to enable us to determine the items of expenditure which go into this account.

The defendant has construed that language most narrowly, and so as to exclude many items, not only of usual and ordinary public expenditures, but also many that are appropriate and necessary for meeting important and usual, if not essential, wants of the people of the State under the conditions of civilization obtaining in this country for more than a century.

Nor are the ordinary expenses of a State government merely those which are necessary and regular in their occurrence, but quite as largely such as are usual, though not periodical, and such as are appropriate, though not essential, to the needs and aspirations of an enlightened and progressive people, and as are lawful.

In the constrained and narrow meaning ascribed to those words, and the consequent classification of State expenditures, made by the defendant, the contrast has been between some selected usual regularly recurring expenditures of what are claimed to be of a purely governmental character on the one hand, and all other expenditures of the State government, however proper, lawful, appropriate, regular, or indeed necessary in a free American State, on the other hand.

Now we respectfully submit that the contrast implied here is not between the word "ordinary" on the one hand, and the word "regular," or even the word "annual," or any combination of those words, on the other hand.

The contrast is, and was manifestly intended to be, between "ordinary" and "extraordinary,"—all ordinary expenses of the State government not already embraced in the account being intended to be included, and all extraordinary expenses to be excluded from the computation of the expenses, a just proportion of which should be charged against the new State.

Nor is the inquiry limited by its terms to such expenses as may be argued to be purely governmental,—as, for instance, the "civil list," and such as are usually incurred by a government acting in its political capacity. There is no such limitation expressed or suggested by the language of the decree or of the Ordinance.

The account is required to embrace "the ordinary expenses," and therefore *all* of the ordinary expenses of the State government, during the prescribed period, not embraced in the preceding account, of whatever character, must be included in it, so that it is not necessary for us to enter upon the field of conjecture and speculation, which opposing counsel would have us traverse, in order to determine what expenses were, and what expenses were not, distinctly governmental.

The fact is that under the uniform practice of enlightened States and communities such expenses as are usual, though not regularly periodical, and as are necessary, or appropriate, and are lawful—that is, *within the legitimate powers of the State government*—are ordinary expenses, and such as are unnecessary, or abnormal, are to be considered as extraordinary expenses of a State government.

In a modern State, and particularly in a State of the American Union, caring for, conserving and promoting the economic and material, as well as the social, sanitary, physical, intellectual and moral welfare of its people, many expenditures which may not be regarded as strictly governmental, and some which may not be absolutely necessary, are proper, lawful, usual and ordinary.

It will be found that the terms "ordinary expenses of government" have been carefully considered by learned, trained, and able experts upon the subject of State revenues, expenditures, and finance, by experienced statisticians and accountants, and by courts of high standing, and that these authorities sanction the reasonable and natural construction and application of those terms which we claim to be their true meaning and intendment.

The following are some of the precedents and authorities bearing directly upon this subject, to which we have had access. They will be found to clearly and absolutely confirm the views above expressed.

We give, first, the classification as adopted by the United States government.

The ordinary expenditures of that government are classified and stated as given below.

For this we take as an example the statements for the fiscal year ending June 30, 1874, from the Report of the Secretary of the Treasury of the United States, as follows:

"For Civil Expenses	$ 17,627,115.09
For Foreign Intercourse	1,508,064.27
For Indians	6,692,462.09
For Pensions	29,038,414.66

For Military Establishment, including Fortifications, River and Harbor Improvements and Arsenals	42,313,927.22
For Naval Establishment, Including Vessels and Machinery, and Improvements at Navy Yards	30,932,587.42
For Miscellaneous Civil, *Including Public Buildings, Light Houses*, and Collecting Revenue	50,506,414.25
For Interest on the Public Debt	107,119,815.21
Total *Net* Ordinary Expenditures, Exclusive of the Public Debt (that is payments on the Public Debt)	$285,738,800.21"

Report of the Secretary of the Treasury of date December 7, 1874, page iv.

At page v of the same report, Hon. B. H. Bristow, the then Secretary of the Treasury, gives a similar itemized summary and classification of the ordinary expenditures of the National government for the first quarter of the fiscal year ending June 30, 1875. And on page vii of same report he gives an estimate of the ordinary expenditures of the government for the fiscal year ending June 30, 1876, amounting to $272,778,000.00, made up of the items as stated and classified in the statements of actual expenditures for the two preceding years.

In this statement there is estimated for,

Interest on the public debt	$98,000,000.00
On the Pacific Railway bonds	3,878,000.00

as part of the ordinary expenses of the government.

The report of the Secretary of the Treasury for 1904 (House Documents, 58th Congress, Vol. 31, p. 5) gives the total *ordinary* expenditures, exclusive of Postal Service:

	For 1903	For 1904
	at $506,099,007.04	at $582,402,321.31
including in these aggregates the following:		
For Indian Service..	$ 12,935,668.08	$ 10,438,350.09
For Pensions	138,425,646.07	142,559,266.36
For interest on Public Debt	28,556,348.82	24,646,489.81

The attention of the court is called to the items which make up the above aggregate of expenses for those years which are given on pp. 3, 4 and 5 of that report, which will be found to be very interesting as showing what expenditures of the government were classified as "ordinary."

The annual report of the Secretary of the Treasury for year ending June 30, 1908, gives the following statement of the ordinary expenses of the United States government:

"*Disbursements:*

Civil Establishments	$175,420,408.57
Military	175,840,452.99
Naval	118,037,097.15
Indian Service	14,579,755.75
Pensions	153,892,467.01
Interest on Public Debt	21,426,138.21
	$659,196,319.68
Postal Service	191,478,663.41
Total *ordinary* disbursements, including Postal	$850,674,983.09"

See also the classification of ordinary expenses of the National government tabulated for the ten years ending June 30, 1890, in the Eleventh Census. House Miscellaneous Documents, 1st Sess. 52d Cong., 1891-92, Vol. 50, Part II., "Wealth, Debt, and Taxa-

tion," pp. 418, 419. The more carefully these tables are examined the more confirmatory they will be found of the natural and reasonable construction of the words "ordinary expenses of the government of Virginia," adopted by the accountants for Virginia.

Examples to the same effect, as to the practice of the United States government in the classification of the expenditures which are ordinary expenses of government might be multiplied, but the above will suffice.

As to the expenses of State governments which are regarded and treated as "ordinary," we beg leave to refer to the volume of the 11th Census of the United States, just cited, where at pages 464 to 477 the annual and aggregate ordinary and other expenditures of each of the States of the American Union are stated for each year and for the decade ending with the fiscal year 1890.

It will be seen that in each instance the great mass of the expenditures of the State governments of a public character, including "charities and gratuities" (such as the maintenance of eleemosynary institutions and pensions), and including in every case "interest on State debt," are counted as ordinary expenditures of the State governments.

At pages 516 to 533 of the volume of the 11th Census just cited will be found a tabulated statement of the expenditures of 1,319 counties of the different States reporting in 1890, in which there is a compilation of such county expenses as are to be considered as "ordinary," which gives data very interesting and pertinent to our present inquiry. In every instance the "interest on county debt," as well as a number of other items of public expenditure of a more or less irregular occurrence, and not at all always politico-governmental in their character, such as expenditures coming under the heads of "Buildings, grounds, and *improvements*," "Roads, ditches, and *bridges*, charities and *gratuities*," and "*Miscellaneous*" are put in the category of ordinary expenses of government.

The same comments will be found to apply with emphasis to the returns and classification of the expenditures of cities having 50,000 or more inhabitants given at pages 556-557; and to the

tables giving the same statistics as to municipalities having 4,000 or more, but less than 50,000 inhabitants, at pages 580-590 of the same volume of the 11th Census.

Strongly confirming the reasonable classification for which we contend will be also found the practice of both the States and cities of our country on this subject.

In this connection we would call attention to the Report of the "Bureau of Inspection and Supervision of Public Offices" of the State of Ohio for 1906, which gives comparative statistics of cities of Ohio. This report give us a scientific and accurate classification of all public expenditures.

At pages 72-89 is printed a detailed schedule of ordinary expenditures of the cities of that State, each of which embraces the great mass of the expenditures of those cities for any public purpose, and in every instance counts interest upon the public debt as an "ordinary" expense.

A very valuable contribution to the law and literature upon this subject is the 46th Annual Report of the Comptroller of the City of Chicago, 1902. This particular report is of all the more significance because it is approved by Messrs. Haskins & Sells, Certified Public Accountants, of 30 Broad Street, New York, who were employed by the City of Chicago to supervise the preparation of all portions of the Comptroller's Annual Report relating to the receipt, accounting for, and disbursement of moneys for the year 1902. (See their certificate at page 43.) This is all the more interesting because Mr. Thomas Bird Dixey, the accomplished chief accountant for West Virginia, testified that he was at one time the manager of Messrs. Haskins & Sells. At pages 90 to 97 of this report will be found tabulated statements giving in considerable detail the items of the ordinary expenses of the City of Chicago for the year 1902, and the extraordinary expenses of that city for the year 1902, at page 98.

It will be seen that all interest paid, whether on bonded debt or upon miscellaneous accounts, and all cost of exchanges is charged as an ordinary expense of the city, and so also a vast number of items for salaries, maintenance of charitable and other institutions,

maintenance, repair, and renewal of buildings, etc., are treated as ordinary expenses.

Some items are by these skilful accountans for Chicago rather arbitrarily classied as "extraordinary," which are among the usual, appropriate, and necessary expenditures of city governments, such as the purchase of new boilers for fire boat, the extension or the erection of new bridges, and the enlargement of various public works, expenditures which, however expert accounts may regard them, are, according to judicial interpretation, as well as according to the uniform practice of the Federal, State, municipal and county governments, properly to be classed as ordinary expenses of a municipality or other local government.

Still the classification and system of accounting sanctioned by the City of Chicago supports the correctness of more than 95 per cent. in amount of the items which have been embraced by Virginia in the account of ordinary expenses of the State government.

Very many more examples and precedents from the well-considered and enlightened experience and practice of the National, State, county and municipal governments, in America, can doubtless be cited, but it would be merely cumulative authority for propositions which are almost axiomatic, and the precedents and authorities in the support of which are as to all of the items claimed by Virginia overwhelmingly preponderating, and as to more than nineteen twentieths in amount of those items practically unanimous.

We desire now to invite attention to the views of Doctor Bastable, a writer of recognized ability and authority upon any such question.

In his work on "Public Finance," in discussing the subject of "Public Expenditures," that eminent political economist says:

> Sec. 1. "State outlay like that of an individual may be distinguished into normal or 'ordinary,' and abnormal or 'extraordinary.' These terms almost explain themselves, but may be thus contrasted: Normal expenditure is that which recurs at stated periods and in a regular manner; it is accordingly capable of being regularly estimated, and provided for. Extraordinary expenditure has to be made at indefinite times and

for uncertain amounts, and it cannot be reckoned for with a approach to accuracy."

But he adds:

"The distinction is not always applied in the same w and indeed the boundary line is not sharply drawn." P. 1

And again on page 132:

"There is also in modern States a greater facility for fo seeing, and so to say discounting the future. The refined fina cial mechanism by which public borrowing is carried out e ables 'extraordinary' expenditure for a short period to transformed into 'ordinary' expenditure for a long one."

And again at page 133:

"Abnormal expenditure also frequently occurs in a som what different way, as in the case of durable public works other improvements. * * * Outlay of this kind is, in m cantile phraseology, 'chargeable to capital, not to revenue,' a is clearly abnormal. The method almost invariably adopted to meet the abnormal outlay by an abnormal receipt, viz., b rowing, or to put it in another way, to turn the extraordina expense of a given year into the ordinary one of interest debt."

This distinguished author wrote with reference to British p cedents. In the States of the American Union there are many su jects of public expenditure which are usual, appropriate, and oft necessary, though not regularly recurring, which are doubtless u known in Great Britain, but which are none the less ordinary.

The tendency of expert accountants seems recently to be assimilate the accounts of expenditures of governments to the of public service and other like corporations; that is, to treat the which are "chargeable to capital" as "extraordinary," and the "chargeable to revenue" as "ordinary."

A little reflection will show that there are many expenditu of a State which are necessary, proper, and usual under the con

tions of modern civilization, and which therefore are "ordinary," but which add to the public, though not always to the fiscal, assets of the State.

As will be seen, the rule as sanctioned by judicial decision, and by the great majority of precedents, while affirming the main doctrine as laid down by Doctor Bastable, is in this particular somewhat different from that stated by him, and is in accordance with the reasonable and just contention of the plaintiff.

See also paper prepared by Professor T. S. Adams, of the Department of Economics in the University of Wisconsin, which contains an able, learned and non-partizan discussion of this subject, printed as Appendix IV of this Note or Argument.*

These conclusions are also supported by the decision of the Supreme Court of Alabama in the case of the *Intendant and Council of Livingston* v. *Pippin*, 31 Ala. 542, and by the decision in the case of *State, ex. rel. Branch* v. *Leapheart, State Treasurer*, 11 South Carolina, 458 and by a number of other authorities, which have been ably reviewed by the Master.—See Master's Report, pp. 87 to 113.

There were some items of expenditure which the Master has deemed it proper to reject on the ground that they were not ordinary expenses of the State government, which we think can and should be classified as ordinary expenses. Such is the item of $258,906.28, on account of constitutional conventions, a usual, regular and ordinary expenditure, though not one of periodical occurrence, in Virginia and other States of the American Union; also

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*Note.—This very instructive paper was obtained under the following circumstances:

Mr. Anderson, then Attorney General of Virginia, in 1909, wrote to Doctor Richard T. Ely, of the University of Wisconsin, (than whom there is no more learned and eminent master of the science of Economics in this country), for information as to the most trustworthy authorities upon the subject of public finance, particularly in reference to the proper definition and classification of such expenditures as are "the ordinary expenses of a State."

Doctor Ely referred Mr. Anderson's letter to Professor Adams, for whom he vouched, as being better situated to give the desired information.

Professor Adams, thereupon, prepared the able and elaborate paper which is printed as Appendix IV hereunto, a service which was generously rendered by him as a free contribution to the literature of this case.

expenditures for establishing boundary lines of the State, for making maps of its territory, and expenditures for the enlargement and improvement of the buildings and grounds of the deaf, dumb and blind institutions, and other charitable and educational institutions of the State, which we think the Master should have allowed as items of ordinary governmental expenditures, under the precedents and under the conditions of life prevailing in Virginia and the other States of the American Union, and in all other enlightened and civilized countries. If, as we are confident is true, the provisions of the Wheeling Ordinance should, under the circumstances under which it was enacted, be construed more strongly against West Virginia, whose citizens and representatives were its actual framers and enactors, then there can be no question but that all of these items of charge against her, rejected by the Master, should be allowed. We are content, however, to submit to the court the propriety of the Master's action in disallowing these several items, without further prolonging the discussion.

We are convinced that the conclusions reached by the Master under this paragraph of the decree, except as to the cost of constitutional conventions and the expenditures upon the instrumentalities and institutions of the State government rejected by him, are in general and in almost every particular, in substantial accordance with the legal and equitable rights of the parties and with the foregoing principles, and we therefore make no other exception to his findings under this head.

The reasoning of the Master and the authorities cited by him in support of his conclusions leave little, if anything, to be said in support of their correctness.

1. *As to the Ordinary Expenses of the State Government.*

The master finds the total aggregate ordinary expenditures of the Commonwealth during the agreed period, from March 19, 1823, to December 31, 1860, to have been.....	$40,274,896.70
Of this sum the defendant concedes the correctness of items aggregating	18,207,784.29
The defendant contests items aggregating.....	$22,067,212.41

The most important of these items of expenditure objected to by the defendant are the payments regularly made by the Commonwealth during all of that period on account of interest on the public debt, aggregating $18,574,747.84.—See Master's Report, pp. 87, 139.

The Master's findings on these different controverted items, and the reasons given by him in support thereof, are so clearly and fully stated by him, and so entirely supported by the record, and by reason and authority, that we are saved the necessity of any very elaborate argument in support of the correctness of those findings.

We will notice only two of the controverted items, the allowance of which by the Master, is objected to by the defendant.

(a)

The Master has allowed, as a proper item of ordinary expenditure of the State, the sum of $3,056,239.64 expended out of the State treasury, during that period, upon schools.—Master's Report, 132.

West Virginia certainly cannot justly object to this charge. There cannot be a shadow of a doubt that this sum was expended in the several counties of the Commonwealth during that period, and that they were annual ordinary expenses of the State government for the purpose stated—the most regular and the most ordinary of all the expenditures of the Commonwealth during that period, except the annual disbursements on account of interest.

The complainant had urged before the Master that so much of the expenditures made by the State on account of schools as were actually paid out in West Virginia counties, being distinctly allocated to those counties, should be charged against West Virginia under Paragraph III of the decree, as being "expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted," "all" of which expenditures were required by the decree and by the Wheeling Ordinance to be charged against West Virginia.—See Exhibit C-1. p. 3, R. 374.

There was no question but that expenditures, amounting to the identical sum of $830,865.37 as shown by that exhibit, had been made out of the State treasury distinctly in West Virginia counties on account of schools between March 19, 1823, and January 1, 1861.

The Master took a different view, his conclusion being that the expenditures made on account of schools should not be treated as distinctly expenditures made in West Virginia territory under Paragraph III of the decree, but as a part of the general, ordinary expenses of the State government; and that, instead of charging West Virginia with the sum of $830,865.37, shown by the record to have been actually spent in the counties of that State out of the treasury of Virginia on account of schools, he would ascertain the total amount expended in the State for schools as a part of the ordinary expenses of the State government, and assign to West Virginia her proportion of those aggregate ordinary expenses.

While we think the actual expenditures should have been charged against West Virginia, and not the computed expenditures, we are disposed to waive that point; particularly if the apportionment is made on the basis of the average population *without slaves*, which certainly ought to be the basis adopted, inasmuch as the slaves received no portion of that, or of any other items of the ordinary expenditures of the State government, but as a rule all of said expenditures were made on account of the white population; and, so far as expenditures on account of schools were concerned, they were absolutely confined to white schools and to the white population, and were under the law always actually apportioned upon the basis of free white population.—Appendix to Record, pp. 146 and 147.

Apportioning the total school expenditures on the basis of average white population, as the same is ascertained by the Master (Master's Rep., 141), we have 26.6631 per cent. of $3,056,239.84, or $814,793.53, as the amount assignable to West Virginia; or only $16,071.84—say, 2 per cent.—less than $830,865.37, the agreed proved amount which was actually expended by Virginia in West Virginia counties, on that account, between 1823 and 1861.—See Exhibit C-1, p. 3; R. p. 374.

This result is significant in two particulars of great interest in connection with the question of the rule by which ordinary expenses should be apportioned, which will be considered later on under this paragraph of the decree:

First, in strongly supporting the justice of our contention that the true basis for the apportionment of ordinary expenses is the average white population; and

Second, in showing that that average should be ascertained by decades in the manner approved by the Master.

Stronger confirmation of these two contentions could not be well given than this concrete illustration where the aggregate of proved actual expenditures in West Virginia counties is so nearly the same as the same expenditures in those counties ascertained by estimating them on the basis of total average white population computed by the method adopted by the Master.—Master's Rep., 139, 140 and 141.

We are now come to consider the largest item of this account, involving a question which, because of the amount which it involves, is one of the most important which has arisen in the case, and that is—

(b)

The interest paid by the Commonwealth upon the public debt between March 19, 1823, *and December* 31, 1860, *amounting to* $18,574,747.84.

There were no expenditures of the State government from 1823 to 1861, which were more regular, certain and ordinary than the annual interest on the public debt of the State.

If this was not an ordinary expense of that government, then there was no such expense.

As has been already shown all governments and all authorities, and all expert accountants and statisticians, so far as we have been able to ascertain, agree in classifying the interest on a public debt as among the ordinary expenses of government.

It is to be assumed that the framers of the Wheeling Ordi-

nance intended to do equity. At all events, a court of conscience will not put an unconscionable construction upon that enactment, particularly where a natural and reasonable construction can be given to it, and one which will tend to an equitable result.

Now, if the language of Paragraph IV of the decree, and the language of the Ordinance upon which that paragraph is predicated be so construed as not to require the new State to be charged with its just proportion of the regular and ordinary expenses of the State in the matter of the payment of interest on the common public debt, then West Virginia would be given credit in the account for all of her contributions to the treasury of the Commonwealth on account of said interest charges from 1823 to 1861, and yet she would not be charged with her aliquot just proportion of those same expenditures.

It is not to be presumed that such an unjust provision was intended to be made by the framers of the Wheeling Ordinance; nor will a court of equity give such a strained, unreasonable and unwarranted construction to the language used in that Ordinance, and used also in the decree of reference, as would lead to such inequitable and unconscionable results.

The decree, following the Wheeling Ordinance, requires West Virginia to be charged with a just proportion of the ordinary expenses of the government, and this requirement will not be satisfied, if the largest, the most important, and among the most regular, necessary, and ordinary of those items of expenditure are omitted from those accounts.

2. *As to the Basis of Apportionment of the Ordinary Expenses of the State Government:*

The decree directs that this shall be made on the average total population of Virginia, with and without slaves, as shown by the census of the United States.

In ascertaining the average population of Virginia during the period, the defendant argues that the average for the whole period should be ascertained, and the apportionment made accordingly.

The plaintiff has ascertained that average by decades.—(See Exhibit D-1, p. 2, R. 516).

The Master has adopted the method approved by the plaintiff's accountants.

The purpose of the court in requiring the average population to be struck was doubtless to get as nearly to the true population year by year, and for the very year in which the expenditures were made, as was possible.

It is manifest that this can be more nearly attained by taking the average for each decade, than by taking the average for the entire forty years in lump.

For instance, the average population for the decade from 1830 to 1840 could be fairly ascertained by taking the population as determined by the census year 1830 and in the census year 1840, and dividing the sum by two, so as to give approximately the average for each year from 1830 to 1840; and so as to each of the other decades. And this has been done accordingly in the account as stated and adopted by the Master.

In no other way can an approximation to the truth be reached, and it is the truth which the court, and which we all wish to attain.

Another important question in this connection is—

Whether the average population with slaves, or the average population without slaves, should be taken as the basis upon which to apportion the ordinary expenses of the State government between Virginia and West Virginia.

This is a question which was left open by the court in its decree of reference, which accordingly has not been passed on by the Master, but is necessary to be decided by the court.

We respectfully submit that the white population of the Commonwealth, and particularly of West Virginia, constituted the best and fairest basis for this apportionment. That is, the free population—the citizenship,—and not the total of the free and the slave population.

The care and policing of the slaves cost the State little or nothing. Those matters were regulated by the masters on the plantations.

The debt was contracted solely by the white population or their white representatives. It was expended by them or under laws of their enactment.

The taxes were levied exclusively upon the property of the free population, and the revenues were appropriated and expended as they directed.

The negroes owed no part of the debt, did not constitute a part of the citizenship of the State during any part of the period of time during which it was contracted, or the money realized from it was expended; nor did they constitute any part of the body politic.

As has been seen a large part of the ordinary expenses of the government, as classified by the Master, consisted of school expenditures, which were entirely confined to the white children.

Under these circumstances we would urge as a just criterion for the apportionment of the ordinary expenses of the State government between West Virginia and Virginia, the white population of the territory embraced in West Virginia, and of the territory still remaining to and constituting the present Commonwealth of Virginia at the period when the expenditures to be apportioned were made.

V.

The fifth inquiry directed is, that the special Master will ascertain—

> "5. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia."

As stated by the Master, "this paragraph is clearly in the alternative with the last clause of Paragraph IV."

A correct response to this inquiry may have an important bearing upon the equities of the case; but it is difficult to see how the valuation of property, real or personal, in the two States would furnish any just criterion for the apportionment of the ordinary expenses of government.

It will be noted that this paragraph fixes no date as of which the fair estimated value of the real and personal property in the counties constituting what is now Virginia and what is West Virginia shall be ascertained.

The second paragraph of the decree fixed the 20th of June, 1863, the date when the formation of the new State was consummated, as the date for ascertaining the assessed valuation of the lands embraced in the two States, and that date was presumably the one contemplated in the fifth paragraph.

It will be recognized as true that the accurate ascertainment of the value of the real and personal property in a State is an exceedingly difficult problem, at any time.

Because of the conditions of disaster, confusion, loss and destruction of values occasioned by the ravages of the then pending war, the difficulty of the solution of this problem is here greatly enhanced. And yet an approximation to a result fair and just under all the circumstances can, we trust, be reached as nearly as is

practicable, by proceeding along the lines of investigation and testimony which have been pursued on behalf of the plaintiff, and as to the real estate by the Master also. The only difference between the method adopted by the Master in this regard, and that pursued by the plaintiff is that the Master has applied that just method to the ascertainment of the value of the real estate in the two States, while the plaintiff has applied it to the ascertainment of the values of both personal and real property.

The land assessments afforded, if not a fair criterion, the only now accessible standard of value of the lands in the counties of undivided Virginia in 1860.

But those valuations were made in 1856, seven years before June, 1863, at which latter date at least four-fifths of the present territory of Virginia and one-fifth of the present territory of West Virginia had been ravaged and desolated by war, so that that valuation of 1856 afforded no just measure of values in 1863. It would suffice, however, to furnish a basis by which the depreciation occasioned by the war could be approximately determined.

The lands were assessed as of their cash specie value in 1856.

The personal property in Virginia counties was assessed annually, on the 1st of February of each year, as of its then cash value, in the currency which then constituted the medium of exchange and the standard of value.

After the war became flagrant, and particularly in February, 1863, that medium of exchange and standard of value, which was the only currency of the people, and the currency with reference to which as a standard of value all their transactions were conducted, was the depreciated currency of the Confederate States.

This was uniformly true in all the regions dominated by the Richmond governments.

There can be no question that the market values of all personal property, and indeed of all property, real and personal, in Confederate Virginia was, throughout 1863, fictitiously enhanced by reason of the depreciation of the currency in circulation in those regions, in which currency alone those values were measured.

This was true also as to West Virginia counties within the Confederate lines. where the assessments were made by officials under the Richmond government.

The personal property in West Virginia counties, outside the Confederate lines, where assessments were made by officers under the Wheeling government, was valued with reference to United States treasury notes (green backs) as a measure of value. The true value of this assesssed personal property in these West Virginia counties could be ascertained approximately, therefore, by applying the scale of gold to the assessment in each case.

It was impossible to get the assessed value of the personal property in a number of Virginia counties because they were so ravaged and so harried by war in 1863 that no assessments were made in them of the very small quantity of personal property which was then left there.

As to real estate, it was by no means an easy matter to get at its true value in 1863, and yet a way has been found by which, taking the assessed valuations of 1860 or 1861 as a basis, this has been reached as nearly as is now possible.

A number of witnesses of unusual intelligence, of the highest character, and most of whom had the best opportunities of ascertaining the facts as to the matters in respect to which they testified, were called on behalf of Virginia. Their testimony will be found at pages 739 to 786 of the record. By them the great destruction and deterioration in value of property, real and personal, in Virginia in June, 1863, is satisfactorily proved, and the fact that the lands had been diminished in value at least one-half, as compared with their value in 1860 or 1861, is established.

This general testimony is powerfully confirmed by the proof of a large number of facts and transactions, proof of actual sales of land in 1863 in Confederate money, and of the valuation by sworn and intelligent commissioners or appraisers of houses and lots in the city of Richmond in the spring, or in June, 1863.

For instance, Capt. Gordon McCabe testified (R. 784) that Westover, an historic estate on James river, for which the owner,

to his personal knowledge, had refused $75,000 in 1859, was sold in 1863 by the owner for $60,000 in Confederate money,—then worth not more than $15,000 or $20,000 in specie; and Major Wellford (R. 762) testified that he was offered the Moss Neck estate on the Rappahannock river, an estate worth at least $40,000 before the war, in the fall of 1863 for $100,000 in Confederate money, then worth about $7,000 in good money; and by Mr. John B. Lightfoot, Jr., a number of most informing and significant facts were proved, which are set forth in the tabulated statements at pages 653 to 664 of the record, which furnish the proof of a number of contemporary sales of lands in Richmond city, Henrico, Hanover and Chesterfield counties, in 1863, at prices showing a depreciation exceeding 50 per cent., as compared with the antebellum assessed values of the same properties.

These were not selected transactions, but Mr. Lightfoot took all of the transactions of the character indicated, which took place about that time, of which the records of those counties and of Richmond City furnished any evidence as to the lands then sold or valued in Confederate money, the assessed value of which in 1860 or 1861 could be ascertained.

The evidence of these concrete facts, taken together with the testimony of the eight witnesses, and the known facts of the history of those times, fully support the contention of the plaintiff that the real estate in Virginia, and in the ten or eleven counties of West Virginia which were usually dominated by the Confederate forces and were generally within the jurisdiction of the Richmond governments, had depreciated at least one-half, as compared with the assessed valuations of the same lands in 1860 or 1861.

The Master has accordingly adopted this valuation as to real estate, and in this he was clearly justified by the proofs, as well as by the history of those times, known and accepted of all men.

To our surprise, however, the Master did not apply the same rules of depreciation to the personal property in the two States.

While he properly finds that the value of the real estate in Virginia had been cut in half and reduced from $296,085,460.30 to $148,042,730.15, he finds that the fair estimated value of the per-

sonal property, including slaves, in Virginia counties had increased, notwithstanding the destruction of war, from $264,512,799 in 1861, to $403,696,228.59 in June, 1863. (See figures given in the Master's report, at pages 167 and 168).

In this finding of the Master he estimated the value of the personal property, other than slaves, in Virginia in June 1863, at $152,844,637.59, as compared with the estimated value of the same kind of property, as stated by him, in 1861, of $102,114,863,—finding that, notwithstanding the depreciation and destruction caused by the war, the personal property in Confederate Virginia was actually worth, in June, 1863, $50,729,774.59, (or nearly fifty per cent.), more than its fair estimated value in 1861.

An examination of the figures adopted by the Master, given on pages 167 to 169 of his report, will show that he gives, as the fair estimated valuation of all personal property, including slaves, in Virginia counties in June 1863.....$403,696,228.59;

Of all personal property, without slaves, in the same counties..... 152,844,637.59;

And that accordingly he computes the fair estimated value of the slaves in Virginia counties, in June, 1863 to have been.....$250,851,591.00;

While he finds that the fair estimated value of slaves in the same counties in 1861 was....$162,537,936.00, the *agreed* valuation of slaves in those counties in that year.

The master's findings, therefore, give us the astounding result, that a considerably smaller number of slaves in Virginia counties in June, 1863, (nearly six months after Mr. Lincoln's emancipation Proclamation had taken effect, by its terms, and had become actually effective in large portions of the territory embraced in those Virginia counties), were actually worth, in good money, $87,329,635 more than a considerably larger number of slaves were worth in 1861, prior to the beginning of the war, and when they had a specie market value.

These results are not only in conflict with the overwhelming proofs in the case, but they are contradicted by the recognized facts of the history of those times.

The slaves in Virginia counties, as well as in West Virginia counties, were all of them then more than three-fourths, if not more than nine-tenths free. As soon as any of that territory came within the Federal lines (and at least one-third of Virginia was at that time within those lines, or dominated by the guns of Federal gunboats), or as soon as the slaves went within the Federal lines, they became actually and absolutely free.

It is simply impossible that it can be true that the personal property, other than slaves, in Confederate Virginia, was worth anything like as much in June, 1863, as that personal property was worth in 1860 or 1861, before it had been subjected to the disastrous and destructive effects of the war which was then prevailing.

It is especially impossible that it can be true that the smaller number of slaves in Virginia in June, 1863, (395, 105. See Joint Exhibit, E-1, p. 7, R. 645), after Mr. Lincoln's Proclamation, were worth as much as, and still less that they could be worth more than the larger number of slaves (472,494, as per U. S. Census of 1860, and Report of First Auditor of Va., 1860-61, p. 75, and Exhibit West Va. 2, R. 823 and 824), in those counties prior to the beginning of the war, when the title of the master and the status of the slave were unquestioned.

The proof shows that slaves were such a precarious property at that time as to possess very little value. As an instance of this, Col. Branch testifies (R. 756), that he purchased a slave in July, 1863, for the equivalent of $225 in gold—"a servant who would certainly have brought $1,200 in 1860, previous to the election."

But no proof ought to be required to show that the slaves in Virginia counties were, in June, 1863, worth very much less than the slaves in the same counties were worth, in good money, in January, 1861, prior to the beginning of the war.

It will be remembered that Virginia at that time was the theatre of the war.

In 1861 large armies had encamped upon her soil.

In 1862 and 1863 armies numbering in the aggregate from 250,000 to 350,000 men had occupied her territory, and largely sub-

sisted upon what they could take from the limited resources of her people.

The Federal troops, in 1863, occupied the greater part of her tidewater counties and large portions of northern Virginia; and all of her coasts along the Atlantic ocean and Chesapeake bay, and the navigable waters of the Potomac, the Rappahannock, the York and the James were dominated by the gunboats of the United States, where not actually occupied by their troops. In all of these sections there were large numbers of slaves.

The *uncontradicted evidence* in the case shows that the depreciation in value extended not only to slaves but to all personal property, and was at least fifty per cent. as a *minimum*. There had been enormous consumption and destruction of every kind of personal property, and what remained had greatly depreciated in value.

Now, it may be that the Master is correct in holding that the plaintiff has failed to show definitely that the depreciation in value of personal property in Virginia counties was, in 1863, 75 per cent. of its value as compared with 1861.

But there can be no question, that the evidence in the cause (found at pages 739 to 786 of the record), corroborated as it is by the known and unquestioned and unquestionable facts of history, abundantly justifies the conclusion that that depreciation amounted to at least fifty per cent. in June, 1863, as compared with January, 1861.

We recognize that a similar depreciation existed in ten or eleven West Virginia counties which were generally held by the Confederate forces and controlled by the Richmond governments, during that period.

The chief importance of the question here discussed is in its bearing upon the question of an equitable proportion of the debt to be borne by West Virginia, and it is because of its bearing upon that aspect of the case that we have taken so much of the time of the court in its discussion.

VI.

By Paragraph VI of the decree the Master is directed to take an account ascertaining—

> "6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union."

The Master finds (see his report, pp. 174-179) that the total payments made into the treasury of Virginia from the counties of West Virginia, for which the latter State is entitled to a credit in the accounting under this paragraph of the decree, amounted to $6,105,884.75.

The plaintiff is satisfied that the findings of the Master under this paragraph do substantial justice between the parties, and therefore waives any objection thereto.

The defendant objects to the Master's findings under this head because he fails to give West Virginia credit for items aggregating $807,646.89.

These items are as follows:

Item 7.—Dividends from banks in West Virginia counties	$786,666.98
Item 8.—Dividends and interest from Turnpike Companies in West Virginia counties	13,595.48
Item 9.—Dividends from Bridge Companies in West Virginia	6,028.51
Item 10.—Dividends from Interstate Turnpike Companies (proportion)	1,355.92
	$807,646.89

See Joint Exhibit, F., p. 1, R. 805; Master's Report, pp. 176, 180.

The Master's finding upon these items is evidently justified by the facts, and is consistent with the language of the decree and of the Wheeling Ordinance.

The amounts received by Virginia upon the accounts and items objected to by the defendant, particularly the dividends upon bank stock, were in no sense money paid into the treasury of the Commonwealth from the counties included in the State of West Virginia.

They were the profits earned by Virginia's own money which she had invested in fiscal institutions; or the returns made to Virginia upon the investments mentioned, and not moneys paid to Virginia from West Virginia counties, within the meaning or within the reason of the sixth paragraph of the decree and of the ninth section of the Wheeling Ordinance, on which that paragraph of the decree is based.

None of them could be regarded as contributions from West Virginia counties, but they were the legitimate earnings from the State's own money invested in the banking business, and in the properties created by its companies.

As to the banks, while they had their principal places of business in West Virginia, their assets were transitory and of a movable character, having their situs not at all necessarily in West Virginia.

It will be seen that the Master had already held, under Paragraph III, that West Virginia was not properly chargeable under that paragraph with the money paid out by the Commonwealth on account of stock subscriptions to banks, located in West Virginia, and had excluded that item from the debit account against West Virginia under that paragraph.

We are convinced that the Master's ruling upon this point was correct, and by analogous reasoning the conclusions reached by the Master under the sixth paragraph, that these dividends were not in any sense public payments, or payments from West Virginia counties, was inevitable.

VII.

The seventh paragraph of the decree directs an account ascertaining—

> "7. The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items, and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof."

This direction of the decree was doubtless given in response to the provisions of sections 1, 2 and 5 of the act of the Wheeling Legislature passed February 3rd, 1863.—Appendix to the Record, pp. 128, 129, 130.

There was a large amount of property, chiefly unappropriated or abandoned, and delinquent or forfeited lands, to which the Commonwealth had title, which passed to the new State by the said act of the Wheeling Legislature, and with the value of which property West Virginia was chargeable by the terms of that act upon such settlement as should be made between the two States.

After the decree of reference was entered it was ascertained by the accountants and counsel for Virginia that West Virginia had recognized the land warrants issued by Virginia prior to June, 1863, and had allowed them to be used, without additional payment to that State, in the acquisition of vacant and unappropriated lands within its limits to the extent of many thousands of acres, and that the new State received nothing for those lands. This was done although the entries were made and the warrants located upon those entries since the formation of the new State.

Under these circumstances, as the new State recognized the warrants of the undivided State, it was considered by counsel for Virginia that it would be inequitable to make any charge against West Virginia on account of those transactions.

It was also found to be impracticable, if not impossible, to find any satisfactory records of the disposition which had been made by the new State of large quantities of lands, delinquent and forfeited to the Commonwealth prior to June, 1863, for the non-payment of taxes, or for failure to enter the same upon the land books for taxation, and that inquiry, therefore, has not been pressed.

So that the only charges made by Virginia under the seventh paragraph of the decree are for money and bank stocks actually received by West Virginia from Virginia after the formation of the new State in 1863 and in 1864.

The fact as to the receipt by West Virginia from the Commonwealth of amounts aggregating $170,771.46, stated in plaintiff's exhibit G-1, R. 819, is assented to and certified by the accountants for both parties, and is reported by the Master at page 181 of his report.

The requirement of Paragraph VII of the decree was that the master should ascertain and report "the amount * * * * * of all money * * * * * which West Virginia received from the Commonwealth of Virginia" * * * * *.

Under these circumstances it is difficult to understand upon what ground the Master excluded these items, amounting to $170,771.46, as to which the facts are unquestionable.

These sums of money were undoubtedly received by the new from the old State. At that time the officials of the restored government of Virginia consisted of West Virginians. That government was dominated by West Virginians, and the new State could appropriate and take out of the treasury of the State of Virginia, at Wheeling, whatever it chose; and it did undoubtedly receive from the "restored" government of Virginia $170,771.46, for which sum, we think, it is fairly chargeable.

It is proper here, however, to call attention to the fact that the Special Master has included in the charges against West Virginia, under Paragraph VII, the value of the stock which represented the amounts expended by the Commonwealth on turnpikes and bridges built by the following companies:

Sweet & Salt Sulphur Springs Co.	$ 7,578.00
White & Salt Sulphur Springs Co.	4,000.00
Fairmount & Palatine Bridge Co.	12,000.00
Making a total of	$23,578.00

The complainant has insisted, and still urges, that, under the terms of Paragraph III, of the decree, and under the language of the Wheeling Ordinance fairly construed, the expenditures made by the Commonwealth in the construction of these internal improvements should be charged against West Virginia under the third paragraph of the decree; and by her second exception she has objected to the Master's report for not charging West Virginia with items 60, 136 and 145, Joint Exhibit C-1, R. 375, 377,—which items cover the expenditures made by Virginia on said Sweet & Salt Sulphur and White & Salt Sulphur Turnpikes, and on said Fairmount & Palantine Bridge.

If the complainant's second exception is sustained as to those items, the corresponding items charged by the Master under Paragraph VII, of the decree, aggregating $23,578, covering the values of the expenditures in those works which were transferred to West Virginia, should be deducted from the aggregate charged against West Virginia under said seventh paragraph.

We submit herewith a statement showing the amount chargeable against West Virginia under this paragraph of the decree in accordance with the facts here stated, which are entirely sustained by the record.

Statement of Money, Property, and Stocks received by West Virginia from Virginia on and after June 20, 1863,—Paragraph VII:

(a) As found by the master (Master's Rep. 193).	$500,828.00
(b) Add for cash received by West Virginia from Virginia (Master's Rep. 181 and 193).....	170,771.46
Making a total of	671,599.46
Deduct for value of stock in the Sweet & Salt Sulphur Springs, and White & Salt Sulphur Springs Turnpike Companies, and the Fairmount & Palatine Bridge Company, the expenditures upon which are included in the total of $1,104,400.85 which complainant claims should be charged under Paragraph III (see Plaintiff's Exceptions, p. 12, and Joint Exhibit C-1, pp. 4, 5 and 6, R. 375, 376 and 377, and Master's Rep. 193).....	23,578.00
Balance chargeable to West Virginia.....	$648,021.46

VIII.

What is West Virginia's Share of the Debt?

Our rapid review of the master's report, brings us to the application of its findings—modified in the particulars covered by the few, but important exceptions, which we have taken to those findings—to the solution of the main question in the cause, namely:

> *What, upon the data thus ascertained, is the proportion of the Virginia debt for which West Virginia is liable?*

(1)

It cannot be too strongly emphasized that it is the just and equitable liability of the new State which is to be determined: for the Wheeling Ordinance imposed a just proportion of the debt upon her, and by the compact created by the provisions of section 8 of Article VIII of the West Virginia Constitution and the Acts of Virginia and of Congress, by which she was granted statehood, it was stipulated that an equitable proportion of that debt should be assumed by the new State.

Upon elementary principles there can be no question but that these provisions of the first Constitution of West Virginia constituted an essential stipulation and condition upon which the consent of the Legislature of Virginia to the creation of the new State was predicated. We have a right to assume that the consent of Virginia to her dismemberment would never have been given but for the fair and reasonable stipulation clearly expressed in that Constitution, that the new State should assume an equitable proportion of the common debt, and would provide for the payment of the accruing interest of the principal in thirty-four years.

It is equally, though no more, certain that the United States Congress would never have given its consent to the partition of Virginia and the erection of the new State out of her domain, but for the fact that the new State had undertaken to assume an equitable proportion of the then existing public debt of the Commonwealth,

and to pay the same with the interest thereon. No evidence is needed to establish this; but if it were required it would be furnished by the records of Congress, and by the statements of honorable and distinguished actors in that momentous transaction.

On the 31st of December, 1862, the Act providing for the formation of the State of West Virginia was passed by Congress.

When the bill giving the consent of Congress to the erection of the new State was under consideration in the House of Representatives, the following discussion took place:

> Mr. Olin: * * * * "I desire to ask what will become of the bonds, and other obligations which Virginia has issued or incurred, by the recognition of a new State?" * * * *
>
> Congressional Globe, Pt. I, 3rd Session, 37th Congress, p. 45.

> Mr. Hutchins: "I will answer my friend from New York. Here is the provision of the Constitution of West Virginia in reference to that matter: 'An equitable proportion of the debt of Virginia prior to January the first, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as practicable.'" * * * *
>
> Idem, page 46.

And again, while the bill was still under discussion in the House, the following colloquy occurred:

> Mr. Crittenden: "Mr. Speaker, there is another question to which I invite your attention. The old State of Virginia, when she embraced east and west, owed a large debt. She owes it to this day. Who is to be bound for that debt? Is the new State? How is this debt to be divided?" * * * *
>
> "Mr. Blair, of Virginia: "In regard to the public debt, the Constitution framed by the convention of the people of the proposed new State of West Virginia, binds the new State to pay its just proportion of whatever public debt the State of Virginia owed prior to the Ordinance of Secession." * * * *
>
> Mr. Crittenden: "I only knew, Mr. Speaker, that in this bill there was no provision made for a division of the State

debt. The gentleman tells us there is provision made for it in the Constitution, and I am satisfied with that. That was only a question of mere expediency which I wished to suggest; but although a matter of expediency it was also a matter of justice. If it has been attended to, I have no more to say about it." * * * *

Idem, page 47.

Years afterwards when the subject of the Virginia debt was again under discussion in the United States Senate, statements of great significance and importance upon the very fact we are now considering, were given out by Senator John Sherman, and ex-Senator Waitman T. Willey. Senator Willey was one of the senators from (Restored) Virginia, was one of the makers of the new State, a member of the Wheeling convention, and was an active participant in all of the transactions which led to the formation of West Virginia, had been for years a very active, intelligent, leading and useful member of the Legislature of Virginia, and was as well acquainted with the facts as to the origin and history of the Virginia debt, and with West Virginia's relations to it as any citizen of either State. Under his leadership, and upon the views which he earnestly urged, the United States Senate passed the bill giving the consent of Congress to the creation of West Virginia. Even with his able advocacy of that measure it was only passed by a majority of six votes. Besides his intimate acquaintance with the essential facts upon which West Virginia's obligation for the payment of an equitable proportion of the debt rests, Senator Willey was a man of very high character.

Senator Sherman had been a member of Congress when the bill for the creation of West Virginia was passed. Being from Ohio, an adjoining State, he had taken a deep interest in its enactment and had actively supported it. No two men in the world knew more about the history of that transaction than those two eminent men.

We state here now upon the authority of these honorable senators that the bill admitting West Virginia would never have been

passed but for West Virginia's assumption of an equitable proportion of the debt of Virginia.

During the discussion of the subject in the 47th Congress, Senator Sherman read the following extract from a letter which he had received from Senator Willey:

> "I have a pretty distinct recollection that while the application for admission was pending before the United States Senate, you suggested to me this very matter, and that when I pointed out to you the clause in the Constitution which I have above quoted, you expressed your satisfaction and stated to me that it removed one of the difficulties which had been embarrassing you; and I say to you now, what I have said to the people of West Virginia, that but for that clause in her Constitution, the State would never have been admitted. I SAY FURTHER, THAT IN MY OPINION, NO HONEST MAN, OR HONEST PARTY, IN WEST VIRGINIA, OR OUT OF IT, WILL DENY THE OBLIGATION OF WEST VIRGINIA TO PAY AN EQUITABLE PART OF THE PUBLIC DEBT OF VIRGINIA." (Capitals ours.)

After quoting this extract, and after reading the 8th clause of Article VIII of West Virginia's Constitution, Senator Sherman said:

> "But for this stipulation in the Constitution of West Virginia, which was submitted to the Senate at the time of the passage of the bill to admit that State, it never would have been a State of this Union."—Congressional Record, Vol. 12, 47th Congress, p. 450.

No one can doubt, therefore, that West Virginia owes her existence to her promise to assume an equitable proportion of the debt of the old State, and to provide for the payment of the accruing interest thereon and of the principal of the same.

It is the corner-stone of her existence as a State.

The methods adopted for the purpose of ascertaining what West Virginia's share of the debt is, are merely means for reaching that end, and can be sanctioned only in so far as, fairly pursued, they shall lead to an equitable result.

It becomes important therefore to determine, what, independently of any conventional arrangement, would, under the circumstances which confront us here, be the equitable share of that debt to be borne by West Virginia?

The case presented is a peculiar one. It is *sui generis.*

History furnishes no counterpart, no precise parallel or precedent to guide us, by a clearly blazed path, to a correct conclusion.

Kingdoms, empires, and republics have been divided and subdivided, but never has a State been dismembered just as was Virginia in 1863.

And yet there are certain established rules of right and principles of equity which will enable us to reach a conclusion which will do substantial justice between these parties.

According to the authorities upon public, or international law, copious quotation from which will be found in the Appendix No. 1 to the reply brief for Virginia upon the motion to refer the cause to the master, printed in Vol. II of West Virginia's Compilation, pp. 163 to 167, the accepted doctrine seems to be, as the same is stated by Mr. John Bassett Moore in his Digest of International Law, as follows:

> "In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for as Story says, 'the division of an empire creates no forfeiture of previous vested rights of property.'"
>
> 1 Moore's Digest Int. L., p. 334, citing
> Abdy's Kent, p. 96, and
>
> Lawrence's Wheaton, 52 (m) 20.

The debt should, therefore, be apportioned "ratably" between the old and the new State.

For reasons already abundantly appearing in this case it is exceedingly difficult, to determine accurately the true taxable values of the property in Virginia as at present constituted and in West Virginia, on the 20th of June, 1863. There is less difficulty in determining the relative values as to the real estate in the two

States, respectively, than as to the personal property in the two States.

The destructive and exhausting effects of the war then flagrant, the depreciation of the currency in general use in Confederate Virginia, were much more disastrous in their operation in what is now Virginia than they were in the greater portion of what is now West Virginia. The destruction of personal property was far more final and complete than of real property. When horses or cattle were carried off, or wagons or farming implements were worn out or destroyed, that was an end of them as property to their owners.

The lands might be, and were, greatly impaired in value by the destruction of fences and buildings, and by neglect, but these ravages of war could be, and in fact, in the forty-five years of peace, have been in great part remedied.

Moreover, land existed as property, and as a subject of taxation much more uniformly throughout the territory embraced in both States than did any other species of property.

It constituted therefore a more uniform, as well as a more permanent and stable measure of the wealth and taxable resources of the two States, at any time, and particularly at the date of the formation of West Virginia.

The court must have been influenced by these considerations in framing the second paragraph of the decree of reference, in directing the ascertainment of the "assessed valuation of the territory of Virginia and of West Virginia June 20, 1863," and in excluding from that account the value of the personal property therein.

Now taking up the Master's findings and applying them *seriatim*, as they should be applied, we will endeavor to ascertain what the result is, or should be, as to the part of the debt to be paid by West Virginia:

(1)

There need be no farther discussion under the first paragraph, by which the amount of the debt is ascertained.

(2)

Under the second paragraph it is ascertained that West Virginia had 36.1843 per cent. of the total area of the undivided State.

Apportioning the admitted $33,897,073.82 of the common debt on that basis would assign to West Virginia $12,265,418.88, of which $11,911,822.32 would be principal, and $353,596.56 would be interest.

West Virginia had 33.5231 per cent. of the total population, excluding slaves. On that basis West Virginia would owe $11,363,349.95, of which $11,035,758.90 would be principal, and $327,591.05 interest.

West Virginia had 24.5145 per cent. of the total population, including slaves. On that basis she would owe $8,309,698.16, of which $8,070,140.04 would be principal, and $239,558.12 interest.

West Virginia had 21.7812 per cent. of the total values of real estate upon the basis of the assessed valuation of 1863. Upon this basis she would be charged with $7,383,189.44, of which $7,170,341.40 would be principal, and $212,848.04 would be interest.

What part of the debt does West Virginia owe?

While taxable property seems, as a rule, to be the measure accepted by writers on public law for dividing a common debt between two states formed by the division of a State into two states, it may not be inequitable to bring population into the account here along with property; for population, such as that of these two States certainly constitutes an important factor of productive wealth.

Bringing the total population and the assessed valuation of the real estate into the account as factors, and combining the two and taking the average, we have $7,846,443.80 as West Virginia's portion of the debt, of which $7,620,240.73 would be principal, and $226,203.07 interest.

If, discarding the method defined in the Wheeling Ordinance, the apportionment should be made according to the fair value of the taxable property in the two States in June 1863, taking for those values the figures arrived at in our consideration of the

Master's findings and the evidence under paragraph V, we will have the following results:

Fair estimated value of the taxable property in Virginia and West Virginia Counties, June 20, 1863:

Fair estimated value of real estate in Virginia counties, as ascertained by the Master and accepted by the Plaintiff (Master's Report, p. 168)	$148,042,730 15
Fair estimated value of personal property, other than slaves, in Virginia counties—not exceeding one-half of $152,844,637.59, its Confederate inflated assessed valuation in 1863,	76,422,318.79
Fair esstimated valuation of slaves in Virginia counties, not exceeding in good money as a possible maximum, one-half of $162,537,936, the agreed value on January 1, 1861, of the slaves in Virginia*	81,268,968 00
Fair estimated value of all property, real and personal, in Virginia counties	$305,734,016 94

*Note.—(Explanatory of the item of $81,268,968.00).—Upon the hearing before the Master on the first of January, 1910, the following agreement was made between the counsel for the parties, and made a part of the record:

"*It is agreed*, between the counsel for Virginia and West Virginia that there were 490,865 slaves in the Commonwealth of Virginia on the 31st of December, 1860, and that the fair estimated valuation of such slaves was $344 apiece; that of them, 472,494 were within the territory of the present Commonwealth of Virginia, and that their fair estimated valuation at that time was $162,537,936; and that there were 18,371 of such slaves on the same date in the counties that now constitute the State of West Virginia, and that the fair estimated valuation of such slaves was at that time in the aggregate $6,319,624.

"(Upon request the foregoing agreement was read aloud by the stenographer, and there was no objection to it by counsel for either party).

"Mr. Anderson: The Commonwealth of Virginia does not admit that the facts here conceded to be true are either relevant, material, or responsive to any issue in this case or any direction of the decree. Counsel for Virginia further object to the consideration of these facts by the Master in this case for the reason that both parties have down to the present day construed Section 5 of the decree as referring to the fair estimated value

Fair estimated value of real estate in West Virginia counties as per Master's Report p. 168	$ 67,676,127 44
Fair estimated value of personal property, excluding slaves, in same counties (Master's Report, 168, 169)	24,739,894 21
Fair estimated value of slaves in West Virginia counties, as conceded by Defendant, (Master's Report 169-170)	6,319,624 00
Total fair estimated value of all property, real and personal, in West Virginia	$ 98,735,645 65
Fair estimated value of all taxable property in Virginia and West Virginia as of June 20, 1863, ...	$404,469,662 59
Of which there was in Virginia	$305,734,016 94
And in West Virginia	$ 98,735,645 65

or 24.4111 per cent. in the latter State.

Upon the basis of the fair estimated value of all property in the two States in June, 1863, according to the Plaintiff's statement of those values. West Virginia's share of the debt would be 24,4111

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of the real and personal property in Virginia as of the 20th day of June, 1863, and have taken their testimony, prepared their schedules and exhibits, and until to-day argued the case upon that basis; and they object to the introduction of this new issue into the case at this stage of the litigation."

* * * * * * * *

"The Special Master: Have you any objection to adding this to the agreement?

"*It is further agreed*, inasmuch as Paragraph 5 requires a report of the real and personal property by counties, it is agreed that the aggregate number of slaves stipulated for in the foregoing agreement was taken from the United States Census of 1860, and that in apportioning the number of slaves and the valuation thereof to the various counties, the same census, showing the slaves in the various counties as the basis for making that distribution, shall be used.

"Mr. Anderson: There is no objection to that. Let it be stated in the record that this agreement was made at the close of the argument, on the 1st day of January, 1910."

Stenographic Report of the Hearings before the Master, Vol. 20, pp. 3153-3154.

per cent. of $33,897,073.82, or $8,274,648,58; of which $8,036.100.90 would be principal and $238,547.68 accrued interest.

These estimates are more than liberal to West Virginia, for they include the slaves, both those still nominally in bondage, and those who were actually free, at a valuation equivalent to more than half what those slaves were individually or collectively worth in January, 1861.

We most earnestly and confidently insist that the slaves in Virginia and West Virginia in June, 1863, as a mass constituted no such description of property as to be any just basis upon which to rest any State indebtedness.

The tenure by which they were held was so precarious, both by reason of Mr. Lincoln's Emancipation Proclamation, and because of the facility with which they could secure actual freedom by escaping into the lines of Federal occupation, where they were not already within those lines, as very many of them were, that they constituted no fair basis for the ascertainment of the share of the common debt with which either State should be charged.

The above conservative figures seem clearly to demonstrate that, ascertaining West Virginia's share of the common debt, independently of the Wheeling Ordinance, her equitable share of that liability, computing it upon any basis which would be fair or just, would be $7,383,189.44, with interest on $7,170,339.47 from January 1, 1861,—*as a minimum*, if it be ascertained on the *assessed* values of real estate in the two States June 20, 1863; and that it would be $8,274,648.58, with interest on $8,036,100.90 from January 1, 1861, if the apportionment be made on the basis of fair *estimated* value of both real and personal property (including slaves) in the two States June 20, 1863, and estimating the slaves at a very large value considering all of the facts of the case.

These figures will be found not to vary very radically from the results which will be reached by applying the terms,—(and using the method prescribed by the Wheeling Ordinance, which West Virginia in her answer insists, determined the nature and extent of her liability), to the ascertainment of West Virginia's share of the debt, construing that Ordinance fairly with reference to the established facts and circumstances of the case.

(3.)

West Virginia's Just Share of the Debt Computed under the terms of the Wheeling Ordinance.

We ask the attention of the Court to the question of the amount of West Virginia's liability ascertained in accordance with the findings of the Master's report under paragraphs III, IV, VI and VII of the decree.

We beg leave to file at this point as part of this argument alternative statements prepared by Mr. A. G. Potter, the accomplished expert accountant under whose immediate direction the accounts for the plaintiff were made up in this case, showing the amounts due by West Virginia applying the figures as ascertained by the Master, under each of the paragraphs of the decree. (Appendix V to this Note of Argument).

Mr. Potter has also, at our request, prepared a statement showing what would be the result under the alternative directions of Paragraphs III, IV, V, VII and VI of the decree, if the Wheeling Ordinance is construed and applied in accordance with the contentions of West Virginia, which statement is filed as Appendix VI to this printed argument.

Examination of this statement will show that, if West Virginia's attempt, by *construction*, to defeat the expressed purpose of the Ordinance, and to repudiate the compact which was the condition of her statehood, should be successful, then, instead of West Virginia owing anything, the balance on the accounting would be in her favor, to the extent of from $769,073.57, as a minimum, to $3,123,618.76!!!

These astounding results are reached by ignoring or distorting the unmistakable requirements of the Wheeling Ordinance:

(1) By charging West Virginia with only *some* and a comparatively small part of the actual expenditures made by Virginia in West Virginia territory during the debt period, when the decree and the Ordinance requires the new State to be charged with ALL of those expenditures.

(2) By omitting to charge West Virginia with any share whatsoever of the largest items of the "ordinary expenses," and failing to charge her with a *just proportion* of such expenses as West Virginia concedes to have been "ordinary."

(3) By taking credit for large sums as having been paid into the treasury of Virginia from West Virginia counties, which were never in fact paid into the Virginia treasury, from those counties; and

(4) By omitting to charge West Virginia with money and the fair value of bank stocks which she received from Virginia on and after June 20, 1863.

These results are so unconscionable as to absolutely discredit the data upon which, and the methods by which they are reached.

We will submit alternative statements, showing the amount of West Virginia's liability upon the basis of the Master's report under paragraphs III, IV, VII and VI of the decree, modified as we consider it should be in respect to the so-called "indirect" expenditures made by Virginia in building roads, turnpikes, bridges, &c., in West Virginia territory, and by the addition of the money received by West Virginia from Virginia in 1863 and 1864.

These paragraphs, following the Wheeling Ordinance, direct West Virginia to be charged with three classes of debits:

(1) With all State expenditures in West Virginia counties;

(2) With a fair proportion of the ordinary expenses of the State Government during the specified period; and

(3) In addition to these items under the Ordinance, West Virginia is chargeable with the value of certain bank stocks and with the money which the new State received from Virginia on and after June 20, 1863.

West Virginia is to be credited under the Ordinance and Paragraph VI of the decree with all payments made into the treasury of Virginia from West Virginia counties during the same period.

As we have already seen, the chief points of difference arise in the determination of

(1) What expenditures were made by Virginia in West Virginia territory;

(2) What were the ordinary expenses of the State;

(3) What was West Virginia's fair proportion of those ordinary expenses; and

(4) What payments were made into the State Treasury from West Virginia counties?

These questions have been, already, fully discussed in a general way.

The points of divergence between opposing views will be clearly presented by the following concise tabulated statements, showing the results in dollars and cents:

STATEMENT I.

Stating West Virginia's liability, apportioning ordinary expenses on basis of total population, *including slaves*:

Debit Charges: ....

Paragraph III.—Actual expenditures made by Virginia in West Virginia counties:		
(a) Amount allowed by the Master ....$	2,811,559 98	
(b) Add amount actually expended by Virginia in West Virginia territory through public improvemnet companies	1,104,400 85	$3,915,960 83
Paragraph IV.—Proportion of ordinary expenses, on basis of total population including slaves, ascertained under this paragraph of the decree by the Master (Master's Report, p. 140)		8,147,455 92
Paragraph VII.—Money, property and stock received by West Virginia from Virginia:		
(a) As found by the Master..... (Master's Report p. 193)	$500,828 00	
(b) Add for cash received by West Virginia from Virginia (Master's Report, p. 181)	170,771 46	
	$671,599 46	
Deduct for value of stock, as charged by Master under Paragraph VII,		

of the Sweet & Salt Sulphur Springs and White & Salt Sulphur Springs Turnpike Companies, and the Fairmount & Palatine Bridge Co., the expenditures upon which are included in the above total of $1,104,400.85 (para. III)—See p. 12 Complainant's Exceptions, and Joint Exhibit C-1, pp. 4, 5, 6, R. 375, 376, 377	23,578 00	648.021 46
		$12,711,438 21

Credit West Virginia:

Paragraph VI.—By receipts from West Virginia counties (Master's Report, p. 179) 6,105,884 75

On this basis West Virginia's share of the debt, as of January 1, 1861, would be....$ 6,605,553 46

STATEMENT II.

Stating West Virginia's liability, apportioning ordinary expenses on basis of population, *excluding slaves*:

Debit Charges:	
Para: III.—Expenditures made by Virginia in West Virginia counties, as shown in Statement I	$ 3,915,960 83
Para: IV.—Proportion of ordinary expenses, on basis of population without slaves (Master's Rep. 140)	11,452,862 66
Para: VII.—Money and stocks received by West Virginia from Virginia on and after June 20, 1863,—as shown in Statement I	648,021 46
	$16,016,844 95
Credit West Virginia:	
Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179).....	6,105,884 75
On this basis West Virginia's share of the debt, as of January 1, 1861, would be	$ 9,910,960 20

For reasons already shown to the Court, we consider this a fair, just and equitable basis of adjustment—far fairer than it would be to include the slave population as a factor in making this apportionment. It is the amount assignable to West Virginia under the Wheeling Ordinance, reasonably, and fairly construed and applied.

But, following a suggestion made by Mr. Justice Harlan during one of the former hearings of the case (See West Virginia's Compilation, Vol. II, p. 227), we have had an alternative statement prepared, apportioning the ordinary expenses of the State Government on the Federal basis, by which *three-fifths* of the slaves would be counted, as follows:

STATEMENT III.

.. Ascertaining West Virginia's liability, apportioning ordinary expenses on the basis of total white and three-fifths of the slave population:

Debit Charges

Para: III.—Expenditures made by Virginia in West Virginia counties, as shown in our Statement I, supra		$ 3,915,960 83
Para: IV.—West Virginia's share of ordinary expenses, averaged by decades, on basis of total white and three-fifths of slave population, as follows:		
Mar. 19, 1823 to Sept. 30, 1830..	$ 584,731 27	
Oct. 1, 1830 to Sept. 30 1840..	1,087,063 53	
Oct. 1, 1840 to Sept. 30, 1850..	2,017,673 93	
Oct. 1, 1850 to Dec. 31, 1860.	5,472,521 32	9,161,990 05
Para: VII.—Money and stocks received by West Virginia from Virginia on and after June 20, 1863,—as shown in Statement I, *supra*, ...		648,021 46
		$13,725,972 34

Credit West Virginia

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179)	6,105,884 75
On this basis West Virginia's share of the debt, as of January 1, 1861, would be	$7,620,087 59

It is a significant circumstance that the amount which West Virginia would have to pay upon this basis is so nearly the same as the sum which would be assigned to her, if, discarding the Wheeling Ordinance, the apportionment were made on the basis of the assessed value of the real estate in the two States as of June 20, 1863 which gives West Virginia's share of the debt as being $7,383,189.44, the difference being only $236,898.15, or only about 3 per cent.

Following the Master's report, we will now submit statements of the amount of West Virginia's liability, under the directions of paragraphs III, V, VII and VI of the decree:

STATEMENT IV.

Giving West Virginia's liability, apportioning the ordinary expenses of the State on fair estimated value June 20, 1863 of real and personal property, *with slaves*—estimated values of personal property and slaves being those adopted by the Master but excepted to by Plaintiff:

Debit Charges	
Para: III.—Expenditures by Virginia in West Virginia territory, as shown in our Statement I, above	$ 3,915,960 83
Para: V.—Proportion of ordinary expenses of State Government on basis of estimated value of real and personal property, *including slaves*, counted at the figures reported by the Master for said personal property and slaves on June 20, 1863,—excesssive as we believe, and as we think we have shown those valuations to be (Master's report, p. 172)	6,078,367 96
Para: VII.—Bank stocks and money received by West Virginia from Virginia, on and after June 20, 1863, as shown by Statement I, above	648,021 46
	$10,642,350 25
Credit West Virginia:	
Para: VI.—By receipts from West Virginia counties (Master's report, p. 179)	6,105,884 75
On this basis West Virginia's share of the debt as of January 1, 1861, would be	$ 4,536,465 50

STATEMENT V.

showing West Virginia's share of the debt on same basis as No. IV, except that the *slaves* are *excluded* from the computation of estimated values of real and personal property in June, 1863:

Debit Charges:	
Para: III.—Expenditures in West Virginia territory, as shown in our Statement I, above....	$ 3,915,960 83
Para: V.—Proportion of ordinary expenses, apportioned according to fair estimated value of real and personal property, *without slaves*, (Master's Report 172)	9,463,553 58
Para: VII.—Value of stocks and money received by West Virginia from Virginia on and after June 20, 1863, as shown in our Statement 1 (Master's Rep. 193)....	648,021 46
	$14,027,535 87
Credit West Virginia:	
Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179)	6,105,884 75
On this basis West Virginia's share of the debt as of January 1, 1861, would be	7,921,651 12

These Statements IV and V are given, *not* because we consider that property values constitute the fairest or a fair criterion for the apportionment of the ordinary expenses of a State, or because we consider the Master's large estimates of the value of the personal property and slaves in Virginia in June 1863, as at all justified by the proofs, but merely to indicate that even upon those excessive valuations the indebtedness of West Virginia would be $4,362,964.50, on January 1, 1861, if personal property and slaves be

counted as being worth in Virginia in June 1863, very much more than they were in January, 1861, and would be $7,921,651.12, if slaves is excluded from the calculations, as they ought to be as a matter of fair dealing, in apportioning the ordinary expenses of the State.

STATEMENT VI.

Showing West Virginia's share of the debt, apportioning ordinary expenses on basis of property values, as of January 1, 1861:

Debit Charges:

Para: III.—Expenditures made by Virginia in West Virginia territory, as shown in our Statement I, above	$ 3,915,960	83
Para: V.—Proportion of ordinary expenses on basis of fair estimated property values, *including slaves*, on January 1, 1861, (Master's Rep 173)	6,805,289	57
Para: VII.—Value of money and Bank stocks received by West Virginia from Virginia on and and after June 20, 1863, as shown in Statement I, above	648,021	46
	$11,369,271	86

Credit West Virginia:

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179)	6,105,884	75
On this basis West Virginia's share of the debt, as of January 1, 1861, would be	$ 5,263,387	11

STATEMENT VII.

Showing West Virgina's share of the debt, apportioning ordinary expenses on basis of property values, *excluding slaves*, as of January 1, 1861:

Debit Charges:	
Para: III.—Expenditures made by Virginia in West Virginia territory, as shown in Statement I, above	$ 3,915,960 83
Para: V|—Proportion of ordinary expenses on basis of fair estimated valuation of property, *excluding slaves*, as of January 1, 1861, (Master's Report 173)	8,586,648 25
Para: VII.—Value of stockss and money received by West Virginia from Virginia on and after June 20, 1863, as shown in our Statement I, above, ...	648,021 46
	$13,150,630 54
Credit West Virginia:	
Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179)	6,105,884 75
On this basis West Virginia's share of the debt, as of January 1, 1861, would be	$ 7,044.745 79

These last two tables are given not because we consider the principle on which they are stated a correct one, but merely to show that even upon the inaccurate basis upon which they rest, West Virginia will owe a very large sum.

The more we consider the problems presented in this case the stronger our conviction is that the amount of West Virginia's liability, ascertained under the terms of the Wheeling Ordinance—if that ordinance be sensibly, reasonably, and fairly construed—is

justly and equitably ascertained in Statement II, hereinabove submitted by us. That statement, which is supported by strong considerations of reason and justice, ascertains that indebtedness to be $9,910,960.20, as of January 1, 1861.

In any case and upon any amount for which West Virginia shall be decreed to be liable, we most respectfully and most earnestly insist that interest should be decreed against her according to her moral and legal obligation under the terms of her contract.

With entire deference for the sincerity of the divergent views of our honorable opponents upon these questions, we are persuaded that less than this would not do justice to the complainant, and to the common creditors of the complainant and the defendant here.

(4)

The Liability of West Virginia for Interest.

Is West Virginia justly, legally, equitably, and contractually chargeable with interest?

In this connection, we must remember that the contract which we are considering was a Virginia contract.

Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation, and whenever a debt is due, the debtor is bound to pay interest unless relieved from this obligation by agreement. This is, and has been the law of the Commonwealth for more than one hundred years.

In Jones v. *Williams*, 2 Call, 106, decided in 1799, Edmund Pendleton, who was one of the great Judges of our country, delivering the opinion of the court said:

> "Interest is allowed because it is natural justice that he who has the use of another's money should pay interest for it."

Cited with approval in *Baker* v. *Morris*, 10 Leigh 284, *McVeigh* v. *Howard*, 87 Va., 599, and *Stuart* v. *Hurt*, 88 Va., 343.

In *Hatcher* v. *Lewis*, 4 Randolph 152, 157, the court laid down the rule in the following expressive language:

> "*The interest follows the principal as the shadow does the substance.*"

In *Chapman* v. *Shepherd*, the court said:

> "In contracts for the payment of money, interest is not given as damages at the discretion of the court, or jury, but as an incident to the debt, which the court has no discretion to refuse."

Chapman v. *Shepherd*, 24 Grott, 377, 384
Roberts v. *Cocke*, 28 Gratt, 207.
Tidball v. *Shenandoah National Bank*, 100 Va. 741.

"Interest is favored both by the legislative and judicial bodies of the State."

Tazewell v. *Saunders*, 13 Gratt. 354, 370.

In *McVeigh* v. *Howard*, 87 Va. 599, the Supreme Court of Appeals of Virginia said:

"It is the settled rule that when no day is named in the bond or note given for the payment of a precedent debt, it is due and payable on the day of its date, and bears interest from that date, though no interest be reserved. Such an instrument like a bond or note payable, in Virginia, on demand, is payable presently, and bears interest from date. This doctrine is founded in good conscience and correct morals." * * *

Citing *Jones* v. *Williams* and *Hatcher* v. *Lewis*, quoted above.

Such is the law of Virginia as to interest.
The law of West Virginia in regard thereto is the same.

In *Shipman* v. *Bailey*, 20 W. Va. 140, 146, Judge Snyder, announcing the unanimous opinion of the Supreme Court of Appeals of that State, after citing a number of authorities upon the question, stated the rule as follows:

"Other authorities of the same character might be cited, but, we think, we have given sufficient to establish the rule which seems to be, that in contracts for the payment of money interest on the principal sum is a legal incident of the debt and a part of the contract, and wherever there is a contract for the payment of a specified legal rate of interest, whether such rate is fixed by the contract itself or by the law of the place where the contract is made, the obligation of the contract extends to the payment of such interest as fully as it does to the principal sum, and courts have no more power to change the rate of interest thus fixed, than they have to dispense with the enforcement of the contract either in whole or in part."

That decision reaffirms another proposition, applicable to this case, already a part of the jurisprudence of West Virginia, by the

adjudications of the Supreme Court of Virginia rendered before the birth of the new State, namely, that the *lex loci contractus* controls in the matter of the interest chargeable against a debtor.

In *Pickins* v. *McCoy*, 24 West Va. 344-352, the court affirms *Shipman* v. *Bailey*, and adopts the language just quoted from that decision.

Independently of these West Virginia decisions, such parts of the common law and of the laws of the State of Virginia as were in force on the 20th of June, 1863, when the first Constitution of West Virginia went into operation, and as are not repugnant to said Constitution, were continued and declared to be the law of West Virginia. Section 8 of Article XI, of the first West Virginia Constitution. And see present West Virginia Constitution.

The effect of this provision was to adopt for the new State the body of the common and statute laws of the Commonwealth, so far as the same were in force within the boundaries of the new State on the 20th of June, 1863.

As a part of this body of laws, the law of Virginia as to interest became, and has continued to be, a part of the laws of West Virginia.

Such, then, was the law of Virginia before, at the time of and since the formation of West Virginia, as to the legal and equitable liability of a debtor or contractor to pay interest. Such has been the law of West Virginia since the hour of her birth. And such was, and is, the law of the contract evidenced by the public Acts of Virginia and West Virginia set forth in complainant's Bill.

This is the rule in Virginia as to debts due by the Commonwealth.

The question was presented in the celebrated case of *Higginbotham's Executrix* v. *Commonwealth*, 25 Gratt. 627.

That was a suit against the Commonwealth to recover the amount due Higginbotham's Executrix on certain past due dividends on stocks which had been guaranteed and assumed by Vir-

ginia by the Acts cited in the opinion of the Court.—26 Gratt. 630, 631.

There was no express contract by the State to pay interest upon said dividends. The petitioner's claim was for the amount of the dividends "with its accruing interest."

The unanimous decision of the Supreme Court of Virginia was that "judgment should be entered for the petitioner for the amount of her demand with interest."—Idem, p. 641.

The framers of the Wheeling Ordinance must be presumed to have drawn that instrument with reference to the principle of equity and justice which had then and long before that time been embodied in the laws of Virginia by the repeated decisions of her highest court.

To Virginia and West Virginia lawyers of that day, as since that time, Judge Coalter's apt formula that, "the interest follows the principal as the shadow does the substance," was as familiar as any other accepted rule of equity or of law.

Under the law of Virginia in force at the time of these transactions, interest upon the portion of the debt which West Virginia was to take upon herself, was an esssential incident of the debt, and its payment as much a part of the obligation as was the payment of the principal.

But, even if the *lex loci contractus* had not brought us to this conclusion, the language of the ordinance itself, fairly construed, leads to the same result.

That language is that:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861," etc.

Now, that debt was an interest bearing debt. It was represented by obligations of the undivided State, some of them payable at a future day, some of them at a future day and thereafter at the pleasure of the Commonwealth, but all of them interest bearing obligations, obligations in which the payment of the stipu-

lated interest was made as much a part of the debt as was the payment of the principal.

The interest was an integral part of the debt, and as many of the bonds were payable thirty-four years after date, and over $10,000,000 of them at the pleasure of Virginia, with interest from date, the interest as to much of the debt constituted much the greater part of it.

It was the manifest intention of the enactors of that ordinance, unless we are to ascribe to them the sinister purpose of perpetrating flagrant wrong and injustice, that the new State should take upon itself, and relieve what remained of the old State of a part of the burden of debt which rested upon both States. They knew that that burden consisted as well of interest, as principal, and as much, of interest as of principal.

It was not proposed that the new State should, as soon as she became a State, pay in cash a sum to be ascertained in the manner indicated in the Ordinance. The framers of the ordinance understood too well that under the conditions then existing, it would be impossible for the new State to raise and pay any considerable sum in cash.

Why the new State was dependent upon the old State for the money necessary to enable her to begin business and she did not have and in the nature of things could not command a sufficient amount in cash to pay off one-tenth or even one-twentieth of the then Virginia debt.

The stipulation was not that the new State should pay a sum in cash on account of its share of a common indebtedness; but that it should take upon itself a just proportion of that debt, to be ascertained as in the Ordinance prescribed.

Are we to understand that a court of conscience is to be asked to construe that stipulation to mean that the new State shall take upon itself only a proportion of a part of that debt? That it shall assume a share of the principal only of the debt, but shall be exonerated from any part of the interest which was, and is, as integral a part of the Virginia debt, and of the obligations which

represent it, as the branches are a part of the tree from whose trunk they spring?

In their elaborate arguments in this case, opposing counsel have heretofore devoted very little attention to this important question, although it was plainly in their minds when they prepared their draft of decree, and although their attention was challenged to it by the argument for Virginia. In so far as they have discussed it, they have ignored the facts and principles upon which West Virginia's legal, "equitable," and "just" obligation to assume and pay the interest as well as the principal of her share of the debt, rests.

But West Virginia's equitable and legal liability to pay interest upon her share of the debt of Virginia does not at all depend alone upon the Wheeling Ordinance, or upon the law of Virginia and West Virginia, which makes the interest an essential part of the debt; but it rests still more and beyond the possibility of question upon the express terms of the Constitution under which West Virginia became a State.

The fact, the character and the legal effect of the compact created by that important transaction have already been fully discussed.

West Virginia's solemn covenant in regard to the equitable proportion of that debt which she assumed was that her Legislature should "provide for the liquidation thereof by a Sinking Fund, sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This was precisely in accordance with the plan which had long theretofore been adopted by the Commonwealth for the payment of her debt.

This plan was embodied not only in the statutes but also in the Constitution of Virginia, in force when West Virginia became a State.

It was embodied in that Constitution in the following terms:

> "29. There shall be set apart annually, from the accruing revenues, a sum equal to seven per cent. of the State debt existing on the first day of January in the year one thousand

eight hundred and fifty-two. The fund thus set apart shall be called the sinking fund, and shall be applied to the payment of the interest of the State debt, and the principal of such part as may be redeemable. If no part be redeemable, then the residue of the sinking fund, after the payment of such interest, shall be invested in the bonds or certificates of debt of this Commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the State debt as it shall become redeemable. Whenever, after the first day of January, a debt shall be contracted by the Commonwealth, there shall be set apart in like manner, annually, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction; which sum shall be part of the sinking fund, and shall be applied in the manner before directed. The General Assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection or invasion."

Section 29 of the Constitution of Virginia, in force from January 1, 1852, Code of Virginia for 1860, p. 47; Appendix to the Record, p. 200.

It was expressed and given further effect by the second section of the following Act passed by the General Assembly of Virginia:

"Chap. 17. An act establishing a sinking fund and providing for the payment of the semi-annual interest on and redemption of the public debt.
Passed March 26, 1853.

"2. Whenever after the said first day of January, eighteen hundred and fifty-two, a debt shall be contracted by the Commonwealth, there shall be set apart, in like manner, annually for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction, which sum shall be part of the sinking fund, and shall be applied in the manner hereinbefore directed."

Acts of General Assembly of Virginia, session of 1852-3, p. 29; Appendix to the Record, pp. 200, 201.

Its effect was, therefore, well understood to be to conform the undertaking of West Virginia in regard to the time and manner of the payment of her share of the debt to the plan and scheme of payment which had been adopted by the Commonwealth, and which experience had approved.

That scheme was, the creation from the annual revenues of the State, of a fund equivalent to seven per centum of the principal of the debt. Of this, six per centum went to pay the annually accruing interest, and one per centum was invested and set apart to retire the principal sum due, within thirty-four years, and this arrangement was defined as a sinking fund.

It was found, and if the calculation is made it will be shown to be true, that one *per centum* of any sum invested and compounded at six *per centum* interest per annum, will in thirty-four years produce an amount equal to such sum.

This was the theory and the plan which Virginia had adopted for the liquidation of her debt.

It was a plan with which Messrs. Willey, Van Winkle, Hall, Brown, Haymond, and other members of the first West Virginia Convention, who had been previously members and some of them able members of the General Assembly of Virginia, were doubtless entirely familiar: And it is the same plan which we find incorporated in the scheme of settlement which constitutes a part of the foundation upon which West Virginia's existence as a State rests.

By this clause of West Virginia's Constitution, therefore, it was required, not that the new State should pay a lump sum in cash, to be ascertained in the manner prescribed, but that she should *assume* "an equitable proportion of the public debt of the Commonwealth" existing on the 31st of December, 1860, and should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

The framers of the West Virginia Constitution thus manifestly adopted, and engrafted upon that instrument, the plan which for nine years or more had been a part of the organic and statutory

law of Virginia for the extinguishment of her public debt, and the Legislature of Virginia accepted and approved that plan.

That plan included, (as the West Virginia Constitution also expressly included), an undertaking on the part of the State to pay the accruing interest, and to liquidate or redeem the principal of each bond representing the debt, within thirty-four years.

In simple language, the stipulation of West Virginia expressed in her Constitution, and accepted and acted upon by Virginia, was, that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the princippal thereof within thirty-four years.

That such was her express undertaking, appears from the language of her first Constitution, interpreted according to the reasonable and natural meaning of that language.

That such was the purpose, meaning, and effect of that language, is conclusively shown when we read it in the light of the plan established by the Constitution and statute of Virginia, then in force, for the establishment of a sinking fund for the liquidation of her public debt which plan was adopted by the new State as to its share of that debt.

And so, we find that both by the express terms of the Wheeling Ordinance fairly construed, and by the express terms of the Constitution under which Virginia and the National Congress consented that West Virginia should become a State, this new State has become expressly obligated to pay interest upon the share of the principal of the common public debt for which she is liable.

These positions are not at all in conflict with the general rule of American and of public law, as clearly defined by this court in *United States* v. *North Carolina*, 136 U. S., 211, as the law governing that case, that,

1. "Interest, when not stipulated by contract or authorized by statute, is allowed by the courts as damages for the detention of money or property;"

2. "Interest is not to be awarded against a sovereign unless its

consent has been manifested by an act of its legislature, or by a lawful contract between executive officers;"

3. "By decisions in North Carolina that State, unless by or pursuant to an explicit statute is not liable for interest, even on a sum certain which is over due and unpaid."

See also *South Dakota* v. *North Carolina*, 192 U. S., 286.

The question presented in the case at bar is taken out of the reason and the decision of this court in the North Carolina cases by the following circumstances:

(1) The obligation to pay interest is determined by the *lex loci contractus*, and under the settled law of Virginia which was the law of the contract between West Virginia and Virginia, and under the law of West Virginia also, interest is not and never has been allowed as damages for the detention of money, but in those jurisdictions interest is allowed as an essential incident of a contract, whether express or implied, for the payment of money, and as a matter of right and justice.

This court, in its opinion in *United States* v. *North Carolina*, expressly rested that decision upon the fact that under the law of North Carolina no interest was payable on such a contract.

(2) The payment of interest is here an obligation imposed by statute—first by the Wheeling Ordinance, and second by the Constitution under which West Virginia became a State.

(3) The express contract of West Virginia upon which her existence as a State was conditioned requires her to pay interest on the part of the debt which she assumd.

This is a very much stronger case for a decree for interest than *United States* v. *State of New York*, 160 U. S. 600,, righteous as was the allowance of interest there.

Paraphrasing the language of this court in that case, p. 621, "It would be a reflection upon the" honorable motives of the members of the Conventions which framed the Wheeling Ordinance

and the West Virginia Constitution "if we did not place a liberal interpretation upon those acts and give effect to what, we are not permitted to doubt, was intended by their passage."

Another question which arises in connection with the consideration of this subject, is, from what time is West Virginia justly and equitably bound to pay that interest?

Answer to this is furnished by the Wheeling Ordinance and by the section of the first West Virginia Constitution above quoted.

The settlement by the terms of both instruments was to be made as of the arbitrary date of January 1, 1861, or to be precisely accurate, as of December 31, 1860. That, accordingly, is the date from which fairly equitably, and legally, (because it accords with the express terms of both the ordinance and the Constitution), the interest should be computed.

As already shown, the debt, a proportion of which as of that date, West Virginia was to assume and pay, was an interest bearing debt, and the interest was as integral a part of it as was the principal.

A farther kindred inquiry to the last is: To what time should West Virginia be required to pay such interest?

Our response to this is, that she is justly, equitably and legally bound to pay this interest,

(1) *By the terms of the Wheeling Ordinance;* certainly, for the period during which the debt of the Commonwealth existing on the 31st of December, 1860, would continue to be an interest bearing debt: And we have seen that that was not only until the obligations representing the debt became due, but under the just rule of the law of Virginia as to interest, in force during the whole period of the creation of the debt, until that principal should be fully paid.

(2) By the terms of the section of her Constitution above quoted, accepted by Virginia and by the Congress, West Virginia undertook to pay all the accruing interest on, and the principal of, her share of that debt in thirty-four years.

She has failed and refused to pay that share, or any part of it.

The interest accruing thereon from December 31, 1860, has continued to accrue, as to her, until it now amounts to vastly more than the principal. It was that interest which West Virginia agreed to pay, and it was that principal for the payment of which West Virginia's Legislature was to make provision, so that the same should be paid within thirty-four years.

We are unwilling to anticipate that the learned counsel for the defendant will argue that West Virginia, by the language of that provision of her Constitution, is only bound to pay interest for thirty-four years from December 31, 1860, or from June 20, 1863, because we are unwilling to assume that our distinguished opponents would contend that a State, any more than an individual, should be allowed to take advantage of her own wrong, or profit by her own procrastination, and neglect of duty.

Here, West Virginia has not only not paid a just, or any other proportion of the common public debt, nor provided for the payment of the accruing interest thereon, and for the payment of the principal, but she has persistently failed and refused to do either of these things, and has by the votes of her Legislature, again and again repudiated any and all liability whatever for any part of that indebtedness.

(See Resolutions of Legislature of West Virginia, App. 247, 248.)

With all deference for the distinguished counsel for the defendant, we venture to believe that a court of equity will not allow any defendant, and particularly a State, which should be an exemplar of fair and honorable dealing in all of its transactions, to make gain out of its own palpable dereliction of duty.

And so, our response to such contention, if it shall be urged, is, that equity will not suffer any party to take advantage of his own wrong.

Conclusion

It is, true that the amount which West Virginia is thus equitably bound to pay, including the interest fairly and justly due thereon, will, as of this date, aggregates a very large sum; but

that constitutes no argument for her exoneration from the payment of the same.

Fortunately for West Virginia this indebtedness, even if the very largest sum which under any of the alternative statements in the case could by possibility be found to be due by her, should be decreed against her, would, in the affluence which the record shows she now enjoys, wealth largely resulting from the construction of the very improvements upon which the expenditures made by Virginia in roads, turnpikes, railroads and bridges, and in the improvements of the navigation of her rivers were made,—impose upon her a burden easy to be borne, and light, as compared with what Virginia, during the period of her greatest impoverishment, has assumed and borne.

Virginia not only assumed two-thirds of the original debt and two-thirds of the accumulated interest upon it down to January 1st, 1871, and in addition thereto the accumulated interest upon over $8,000,000 of bonds issued by her on account of unpaid and accumulated interest prior to January 1st, 1871, but she paid off in full large amounts of interest accruing after December 31st, 1860, and before January 1st, 1871; and she has paid off, also, in full very large amounts of the principal of the original debt; and has, also, paid off large amounts of the principal of the two-thirds of the debt assumed by her in 1871.

In addition to this Virginia has paid, as of this date, over $38,000,000 of interest.

It must be remembered that these payments, made by Virginia, have been distributed through a period of more than forty-five years.

Large portions of these payments were made by the people of Virginia out of limited resources, in the period of their greatest poverty and distress.

If interest were to be computed upon the payments thus made by Virginia during the last forty-eight years on account of this common debt,—which would have to be done in order to equalize West Virginia with Virginia in regard to these transactions,—the average period upon which interest should be so computed upon

the payments so made by Virginia in order to thus equalize her with West Virginia, would be considerably more than twenty years; and the amount assumed and paid by Virginia, including the upwards of $25,000,000 of her recognized and regularly met obligations still outstanding, and including the payments she has heretofore made on the whole debt, and on the two-thirds she has specifically assumed, would aggregate considerably over $100,000,000, as of this date.

Large portions of West Virginia would to-day be a wilderness, but for the building of the works of internal improvement whose construction was secured by the expenditures above referred to, and the building of other works of internal improvement which have resulted from the construction of the great lines upon which Virginia expended so many millions of dollars of her substance.

The people of West Virginia are to-day enjoying the fruits of the enterprise and liberality of the Commonwealth in those expenditures,—not only those expended within the limits of West Virginia, but also in the expenditure of millions of dollars on works outside of the territorial limits of West Virginia, but which were built in large part for the purpose of developing the resources of the territory now constituting that State.

Too much emphasis cannot be laid upon these facts and considerations.

Nor can it be forgotten that almost the entire indebtedness which is the subject matter of this investigation was created by the votes of the representatives of West Virginia, and that very little of it ever would have been created but for the support they gave to the Acts by which this large indebtedness was imposed upon the Commonwealth.

The complainant desires and asks only that a decree which is in accordance with the legal and equitable rights and obligations of the parties shall be entered.

Such a decree, she is satisfied, will impose upon the new State the duty of paying a very large sum on account of this long ignored obligation, but a sum, every dollar of which West Vir-

ginia justly owes and the complainant is righteously entitled to recover.

Her earnest plea is that West Virginia is bound both by the terms of the Wheeling Ordinance, and of her first Constitution to pay a just and equitable part of this debt with interest until the same shall be fully paid, and that she shall not be suffered to repudiate either obligation.

She respectfully asks that a decree may be entered for such sum as is thus equitably due, with interest thereon from the 1st day of January, 1861, until the obligation shall be fully discharged.

SAMUEL W. WILLIAMS,
Attorney General of Virginia.

WILLIAM A. ANDERSON,
RANDOLPH HARRISON,
JOHN B. MOON,
Of Counsel for Complainant.

APPENDIX NO. 1.

TO NOTES OF ARGUMENT FOR THE COMPLAINANT.

Statement showing the principal expenditures made by Virginia prior to June 20, 1863, on railroads, canals, and other internal improvements designed and built for the purpose of opening up and developing West Virginia territory, or which are to-day parts of railway systems and lines of communication which serve the territory and people of West Virginia and afford them outlets to the markets of the world:

I. On railroads which constitute parts of the Chesapeake and Ohio Railway:		
On the Virginia Central R. R.		$2,484,134.00
On the Blue Ridge R. R.		1,744,723.00
On the Covington & Ohio R. R.		3,206,461.83
Total on Chesapeake & Ohio R. R.		$7,435,318.83
II. On Railroads which now constitute parts of the Norfolk & Western Railway:		
On Norfolk & Petersburg R. R.	$1,341,341.00	
On Southside Railroad	1,833,500.00	
On Virginia and Tenn. R. R.	3,755,000.00	
		$ 6,929,841.00
On Winchester & Potomac R. R.		$ 270,000.00
On Alexandria, Hampshire & Loudoun R. R.		1,017,248.00
On Marietta & Cincinnati R. R.		202,611.00
Amount expended on Railroads		$15,855,018.83
III. Canals:		
On James River & Kanawha Canal	$10,400,000.00	
On Chesapeake & Ohio Canal	250,000.00	
		$10,650,000.00

IV.	Bridges in West Virginia	81,412.00
V.	On Turnpikes and Roads chiefly in W. Va...	2,849,579.71
VI.	On Navigation Companies in West Virginia..	210,500.00

Total on works built to develop or serving West Virginia $29,646,510.54

For above figures see message of Governor Walker to the General Assembly of Virginia March 8, 1870, Report of West Virginia Debt Commission, West Va.'s Compilation Vol. 1, page 474, and Joint Exhibit C-1, R. 374 to 377; Reports of Auditor of Public Accounts of Virginia 1861, of 2d Auditor, 1872, Journal of House of Delegates of Virginia 1871-2, Document VI.

The above amounts do not include considerable sums expended on roads and turnpikes wholly in what is now Virginia, but which connect with roads or turnpikes lying wholly in West Virginia and constitute lines of travel which serve West Virginia as well as Virginia.

APPENDIX NO. II.

containing extracts from the public records and statutes of the Commonwealth showing the nature, motive, and object of her expenditures through joint stock internal improvement companies:

Report of the Committee on Roads and Internal Navigation to the General Assembly, submitted December, 1815 (Board of Public Works Reports, Vol. 1, p. 43):

"Whatever difference of opinion may have at any time existed as to the expediency of controlling the voluntary direction of the wealth and the labor of individuals by the application of legal constraint, there never has existed a doubt but that it is the duty as well as the interest of every good government to facilitate the necessary communication between its citizens.

"Next to the enjoyment of civil liberty itself, it may be questioned whether the best organized government can assure to those for whose happiness all governments are instituted, a greater blessing than an open, free and easy intercourse with one another by good roads, navigable rivers, and canals. Their tendency, by extending commerce to promote the agriculture and manufacture of a nation and thereby to augment its wealth and population, is too obvious to require much illustration.

"The planter and farmer realize their share of this benefit, in the augmented value of their lands; the manufacturer and the merchant, in the increased and diversified demands for their industry and capital. Nor are the higher interests of society less indebted for their advancement to the multiplication and improvement of these channels of useful intercourse. They afford the means of exploring the natural resources of a country and invite the genius of speculation to fit them for the uses of man. Lands too remote from markets to tempt cultivation; forests, hitherto

regarded as inaccessible; beds of minerals and fossils unknown or neglected, are brought within the reach of ordinary enterprise and rendered subservient to the convenient comfort of the citizen or to the defense and safety of the State. They confer on an extended empire the promptitude and energy of action, which are considered peculiarly characteristic of one of narrow dimensions; since without contracting the limits of its territory they reduce the distance and expedite the communication between the seat of its government and its remotest extremities.

"Whether the public force is to be spread out for defence or combined for attack, they alike contribute to the rapidity and vigor of its operations.

"In a republic, especially, where public opinion exerts a controlling influence, and public virtue should be the spring of all public action, they may be considered an important auxiliary, if not a necessary ingredient of public liberty. They tend to difuse more equally the knowledge which experience acquires and the leisure which wealth alone can purchase; they strengthen the cords of social union and the quick and generous feeling of patriotism, which is ever ready to exclaim at the contemplation of an extended scene of public improvement. 'I love my country because she is worthy of my affection.'

"The duty, which is obligatory upon all governments, is peculiarly incumbent upon one, whose territory like that of Virginia, nature has done so much both to unite and separate—to whom she has presented so many advantages to improve and so many obstacles to overcome.

"No State of the Union is intersected by so many navigable rivers or divided by so many chains of lofty mountains; none perhaps abound with such happy varieties of climate and soil, so many resources for internal commerce. In her coal, iron, lead, tin and salt, she is unrivalled. Her tobacco and grain command the highest prices abroad. The fertile banks of her rivers and the moist valleys of her mountains yield abundant crops of flax and hemp. Her lowlands would supply her with cotton for her own consumption, and the fleeces of the flocks which pasture on her hills are not surpassed in quality.

"Notwithstanding these advantages, the principal part of her commerce and almost the whole of her navigation, pass out of her hands to enrich the coffers of her neighbors. There is scarcely a village to the west of the Blue Ridge and very few above tidewater, from the Roanoke to the Potomac, which derive any part of their supply of manufactured commodities, either foreign or domestic, from the seaports of Virginia.

"While many other States have been advancing in wealth and numbers with a rapidity which has astonished themselves, the ancient Dominion and elder sister of the Union has remained stationary.

"A very large proportion of her western territory is yet unimproved, while a considerable part of her eastern has receded from its former opulence.

"How many sad spectacles do her lowlands of wasted and deserted fields present? Of dwellings abandoned by their proprietors. of churches in ruins? The genius of her ancient hospitality benumbed by the cold touch of penury, spreads his scanty board in naked halls, or seeks a coarser but more plenteous repast in the lonely cabins of the West. The fathers of the land are gone, where the outlet to the ocean turns their thoughts from the place of their nativity and the affections from the haunts of their youth. Beyond the Alleghanies an unexpected revolution threatens the Atlantic States in general, the accomplishment of which will create new interests and views in that flourishing and important section of America, and probably, for them, the hope of reuniting it by commercial ties to the markets of the East.

"If it be true, as your committee confidently believe, that in a connection between the Roanoke, the James, and the Potomac, with the waters of the Kanawha or Ohio, this Commonwealth possesses the best means of arresting the progress of this revolution, it is a duty which she owes not only to her self, but to the Atlantic States and to the Union at large to call those means into action

* * *

"Your committee are far from intimating that the General Assembly of Virginia has been totally unmindful of those natural advantages or wholly regardless of their improvement.

"The Commonwealth required time to recover from pecuniary losses which she sustained during the War of the Revolution. It found her citizens laboring under very heavy private debts, and left her government encumbered with a public debt of much greater magnitude. .. .. ..

"Yet in circumstances so inauspicious the statesmen of that day and especially the illustrious man to whom, under heaven this nation was indebted for the establishment of its freedom, did not disdain to enquire into the humblest means of giving to that freedom value. From his zealous exertions sprung the Potomac and James River canal companies. To the first of these the Commonwealth is indebted for a water communication 338 miles: and upon it and the contemplated works of the Shenandoah she relies for the further improvement of a navigation of 390 miles. She has shared with a sister State the benefits of the labor already performed on this river; in that which remains to be accomplished on the south branch of the Potomac and Cacapehon and the Shenandoah, she has an extensive interest.

"The James River Company have opened a navigation of 300 miles.

"The Appomattox and Dismal Swamp canal naturally followed into existence those which were indebted for their origin to the patriotism of General Washington. The former opened a navigation of 100 miles. The latter was designed merely to connect waters already navigable, but in its present use and remote consequences is not inferior in importance to any public work in the Commonwealth.

"The expense of the first of the preceding work does not exceed $1,500 per mile upon the navigation already opened; that of the second is about $1,200; the average expense will be annually diminished in the history of future improvements on the branches of those rivers as the principal obstructions to their navigation were removed before their waters could be brought into partial use.

"The actual cost of those public works does not exceed one-third of the expense usually attendant upon the structure of turnpike roads; which in the absence of navigation are the only substitute

for them. It is due to the latter, however, to remark that the addition recently made to them of parallel lines of rails, immovably set in the earth at proper intervals for the wheels of wagons, has more than equalized the advantages of such roads with the best ascending navigation which the resources of Virginia afford above their principal falls; and that the additional cost which this improvement gives to the structure of the turnpike, although great in itself, is inconsiderable when compared with its effect in reducing the expense of loads carried. The turnpike roads of the Commonwealth except a few short pieces of particularly mountainous, and a road recently begun from Fredericksburg towards the Blue Ridge, are confined principally to the county of Loudoun, the adjacent counties of Fairfax, Fauquier, Frederick, and to the vicinity of the seat of Government,

"There is but one to which the funds of the Commonwealth have contributed any aid.

"All of these public works are alike in one respect. They purpose to defray the expense of their first cost and of their subsequent repairs, out of the tolls collected upon them; and these are equitably levied upon those who use them in sums proportionate to the benefit which they respectively derive from such use. Where it is absolutely certain that such works can subsist upon this basis alone, the revenue of the Commonwealth, although it may expedite their progress, is not indispensably necessary to their creation."

"Private wealth will of itself take the direction which personal interest prompts. But there are many such works essential to the prosperity of the Commonwealth, the persons immediately interested in which have not capitals sufficient to commence their foundation, and there are many others of like utility which if completed would require the lapse of many years to make them profitable to the individual subscribers to their stock. The population and commerce which infallibly follow their direction, spread out upon their borders and swell their tolls, cannot be expected to precede their existence.

"Although almost all the turnpike roads within the Commonwealth of Virginia have been made without any other legislative

aid than their respective acts of incorporation, yet it is probable that neither the Potomac nor James River would have been rendered navigable above tidewater with such assistance alone. Maryland and Virginia subscribed more than one-half of the capital stock of the former, and Virginia alone more than one-third of the latter. The tolls hitherto collected on the one would not have justified a subscription to its stock with a view to mere profit; and though those of the latter have for some time realized the most sanguine expectations of its friends and its stock is 80 per cent. above par, yet the revenue of the company apart from the appreciation of its stock, would not net to its members 6 per cent. per annum upon the sums which they have actually expended upon that river from the commencement of their labors to the present period.

"Your committee, however, confidently believe there is not an individual within the Commonwealth alive to a sense of her true interests who would have desired for the sake of a higher profit to the treasury upon the stock of the public in either of these works, to withdraw the funds which were required for their completion and permit this noble resource to return to a state of nature.

"Those who reside near to their banks directly participated in the benefits thus afforded them of a cheaper mode of transporting the productions of their labor to market; and those even who accidentally possessed the superior advantages of tidewater, or who were compelled by their distance from both to resort to the common highways in order to reach the same markets, have greatly profited by those improvements of navigation which augment the extent and value of that market, could not fail proportionately to enhance the price for their produce. So true it is that whatever contributes to increase the population and wealth of the towns must contribute to the growth and improvement of the country. And this effect is wrought not solely on the vicinity of those towns, it is seen not merely in the wealth which collects in their suburbs; but is discovered in the augmentation of their means of consumption and the enlargement of their commercial capitals.

"In this necessary and reciprocal relation of commerce and agriculture, the country below tidewater in Virginia has an immed-

iate and even local interest in the progress and perfection of all those public works exclusive of its general interest in whatever advances the growth and prosperity of the Commonwealth. The inhabitants of the lowlands will therefore partake of the benefit of every application of public revenue to the improvement of the connection between their market towns and the country above them. It should be peculiarly their policy to turn the commerce to the west from its northern direction into the bosom of their own territory. In the efforts which are contemplated to improve the roads passing immediately through their own country they have an interest more sensible to the eye but less so to the understanding.

"Although much has been done for the improvement of the interior of Virginia, more yet remains to be accomplished."

"If nature has divided the territory of the Commonwealth by numerous chains of lofty mountains it is only to incite the genius of mankind to climb them, and the period is not unthinkable—nay, it rests with the legislature to determine whether it be remote, when the roads which cross those natural and formidable barriers shall not be surpassed by those which run along their base * * *

"Should the General Assembly determine to patronize by the application of the public revenue all such works as are likely to be of great public utility, it becomes important to decide whether an improvement may not be made in the mode heretofore pursued of extending to them patronage.

"Your committee are fully satisfied that much loss has been sustained by all the canal companies which have been incorporated hitherto for want of skill in their conduct. Their directors have served, it is true, without compensation. They have generally been public spirited private gentlemen, but neither professional engineers nor capable from experience and observation of guarding against the errors and frauds of agents who pretended to be so.

"No single company could afford to purchase or could fully employ in a country where a few public works were begun, the services of a distinguished engineer; and yet without the previous surveys, plans and estimates of such an officer, no very arduous public work could be confidently begun or successfully conducted. To

supply the defect of such an officer would be the obvious interest of the Commonwealth, and if he were not sufficiently compensated by the general utility of his labors, he might demand of each company such an interest in its stock as would be equivalent to the value of the service rendered to the company by such officer.

"Whatever funds the legislature may be inclined to appropriate for internal improvements, a difficulty must occur in settling the relative importance of its principal objects; and if the appropriation were also required to designate some particular object it would be often impracticable from the variety of opinion—always existing in an Assembly representing many local interests—to procure an union in the choice of any one.

"The first of these difficulties may be obviated by organizing a proper body to collect and prepare for the General Assembly the facts and information necessary to cast upon every application for a portion of the fund light enough to guide the sound discretion of the Legislature in the selection of subjects."

"And these facts will be entitled to the higher confidence if reported under the sanction of official responsibility."

"To allay such local jealousies as might obstruct an agreement in favor of any single object of internal improvement, a fund may be previously segregated and set apart for the accomplishment of all by one appropriation. If the term by future application to any, be at the same time prescribed, a like participation in the benefit of the fund would be assured to every interest which it is calculated to promote; and the speedy enjoyment of that benefit will be secured to each by apportioning the magnitude of the fund so set apart to the number and importance of the objects for which it is designed to provide.

"It may be sound policy for the Commonwealth, in order to accomplish some great commercial or political purpose, to throw open to general use, without the charge of toll, a particular canal or road; but it can never be to its interest, for many reasons, to become the sole proprietor of all the public works within its territory.

"Experience testifies that they will be more economically im-

proved and better repaired if their management be left to the individuals who subscribe to their stock, with a view to private gain, than if confined to public officers or agents.

"The Commonwealth should subscribe so much to their stock and on such terms as will suffice to elicit individual wealth for public improvement—and the control which she retains over the conduct of the individual subscribers should extend no further than to prevent or correct such abuses upon the community at large, as might be apprehended from the too eager incentive of gain.

"By yielding to the individual subscribers the profit of the State on its shares of the stock of any company where required to secure such individuals against temporary loss, a much smaller subscription of the public money will suffice to draw forth private enterprise.

"The Commonwealth can never be a loser if a public work judiciously begun be finally perfected—and the public security against such loss will be found in the discretion which the legislature retains over the choice of the object for which its patronage is sought.

"As the market rate of interest decreases in every commercial country with the growth of its capital, the maximum profit of the stock of each company may be reduced after the lapse of a limited period of time.

"The principles laid down in the preceding part of this report the committee has embodied in the resolutions which are subjoined to it; but they would not have performed their duty to the House if before they recommended the application to objects of internal improvement of all the public stock of the Commonwealth as well as the premium which may be hereafter received from the incorporation of new, the extension of the capitals or the duration of the charters of the existing banks, they had not enquired into the actual state of the debts and of the annual revenue and expenditure of the Commonwealth."—

"That inquiry resolves itself into the establishment of the following propositions:

"1st. That for fifteen years prior to the commencement of the

late war, the ordinary revenue of the Commonwealth has not only been adequate to meet the ordinary expenditures charged upon it, but to enable the Commonwealth to arm from time to time a large part of her militia—to lay the foundation of her literary fund, to erect several very costly public edifices, and to complete the purchase of the stock subscribed by the Commonwealth to the Bank of Virginia; objects which occasioned a disbursement from the ordinary revenue of a sum exceeding one million of dollars.

2ndly. That since the commencement of that war the revenue of the Commonwealth more than doubled by additional taxes and farther augmented by considerable loans from the bank, has not only sufficed for the ordinary possible expenditure, but enabled the legislature to assume the State's quota of the direct tax of 1814 and to apply to the defense of the United States a sum exceeding eighteen hundred thousand dollars, exclusive of the interest paid upon those loans.

"3rdly. That the Commonwealth has at present a claim upon the United States of unquestionable justice for more than seventeen hundred thousand dollars of the above amount, together with the interest on such portions of it at least as were obtained on loans, which claim when satisfied will furnish a sum competent to discharge all the debts of the Commonwealth, to provide for the expenditures of the current fiscal year and to leave at the end of that year a balance in the treasury of three hundred and fifty thousand dollars to be applied to any other object of internal interest.

"4thly. That the present taxes may be reduced to the amount levied before the late war, provided the United States shall reimburse the sums advanced for the defense of the Commonwealth; and even should the payment of those sums be withheld, which a just confidence in the good faith of the General Government forbids your committee to expect, a repeal may yet be effected of such proportions of the war taxes as are not absolutely pledged for the payment of the interest, and the redemption of the principal of the public debt.

"From all of which it evidently appears that the fund which it is proposed to apply to the purposes of internal improvement

may be spared from the revenue of the Commonwealth without any embarrassment of her finances, any violation of her engagements or pressure upon her citizens.

"Should the appropriation recommended by the committee receive the sanction of the legislature, the fund for internal improvement will consist of the following stock:

"5,547 shares of stock of the Bank of Virginia on which a dividend is now received, which computed at par is worth five hundred and fifty-four thousand, seven hundred dollars	$554,700.00
"2,400 shares of the stock of the Bank of Virginia whereupon no dividend will accrue until after the first day of May, 1818.	240,000.00
"3,344 shares of the stock of the Farmers' Bank of Virginia	333,400.00
"250 shares of the stock of the James River Company, also estimated at par	50,000.00
"125 shares of the stock of the Appomattox Company	12,500.00
"70 shares of the stock of the Dismal Swamp Canal Company	17,500.00
"70 shares of the stock of the Potomac Company.	31,111.11-1-9
"100 shares of the stock of the Little River Turnpike Company	10,000.00
"Making a total of	$1,249,211.11-1-9

"Of which, the sum of $938,100 is now productive of an annual revenue exceeding $98,000; and $240,000 will become alike productive after the first day of May, 1818.

"In the present state of the fund the progress of the public works to which it may be expected to give rise will be until the first day of May, 1818, at the rate of $245,000 per annum. After that period it will be further augmented by the addition of $60,000.

"So that the total value of the internal improvements of ten years will be $2,777,500, and this calculation is grounded on a sup-

position that a portion of the stock which is now unproductive will continue to be so; and that no augmentation of the fund will have been made by the creation of new banks. * * * * *

"Be it therefore resolved"

* * * * * *

"8. That the president and directors of the Board of Public Works be authorized to subscribe in behalf of the Commonwealth to such public works as the General Assembly may from time to time agree to patronize such portions of the revenue from the fund for internal improvement as may be directed by law; but that no part of the fund shall be subscribed towards the stock of any canal or turnpike company until three-fifths at least of the whole stock necessary to complete such canal or turnpike shall have been otherwise subscribed; nor until of the stock so subscribed one-fifth shall have been paid in by the respective subscribers or the payment thereof effectually secured." (B. P. W. Reps., Vol. I, p. 55 and 59(11) .)

APPENDIX NO. II.

1st Annual Report Board of Public Works, for year 1816, Vol. 1, pt. 1 p. 81.

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"The appeal which the board has thus made to the public spirit of the country has not been in vain. Great efforts have been made to fill the subscriptions for opening the navigation of the Roanoke."

* * * "There are several objects within the scope of the system devised by the General Assembly for the improvement of the interior of Virginia which in the present state of her wealth and population it is beyond the reach of her unassisted ability to ac-

complish; but which being equally interesting to her sister States and the Government of the United States, it may not be impossible to further by their co-operation."

"The failure of the stock of those companies which have already been incorporated to yield an immediate income to the subscribers is to be imputable to their tardy progress in building the works which they had begun; and delay which arose from their having commenced their labors with inadequate funds; and which discouraged new adventurers from uniting with them or hazarding their fortunes in similar enterprises.

"The foundation which the General Assembly have now laid for future works of this description is calculated to remove this impediment to their progress, and to assure to the Commonwealth a speedy return for such sums as the General Assembly may authorize the Board of Public Works to subscribe out of the funds for internal improvement.

"It is not in the power of the Board in the infancy of their institution to include in this report a detail of the report and condition of any public work commenced under the auspices of the act of their incorporation. With a view, however, of early arousing the enterprise and patriotism of their fellow citizens in general to embark their private fortunes in the career of internal improvement opened to them by the liberality of the General Assembly, the Board of Public Works adopted at their extraordinary session the accompanying resolution:

> "'In a country so diversified as the territory of Virginia by rivers and mountains, possessing such a variety of staples and so many markets for their exploitation, the board could be expected to recommend to the General Assembly but a very small number of those public works which the future policy of Virginia may be inclined to patronize, and the fund for public internal improvements hereafter competent to aid:
>
> "'To open the navigation of those rivers, penetrate deeply into the interior of the country; to unite by commercial and political ties the widely extended territory of the Commonwealth, are in the estimation of the board objects of the first

magnitude in the scale of improvements contemplated by the General Assembly.'"
Resolution "B" p. 87, idem.

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"That the making of an artificial road from Staunton to some point on the Ohio River in the county of Wood or Tyler is an object of great importance to the interests of this Commonwealth."

"That the making of an artificial road from some point on Jackson's River to some other point on the navigable waters of the Kanawha River and the extension of the navigation of those rivers as high up the same as practicable, are objects of great importance to the interests of this Commonwealth."

"Resolved, That the making of an artificial road from Salem in the county of Botetourt, to Winchester, is an object of great importance to the interests of this Commonwealth."

"Resolved, That the improvement of the navigation of the Monongalia River is an object of great importance to the interests of this Commonwealth."

"Resolved, That the making of an artificial road from Winchester to a point near the eastern base of the Alleghany Mountain, on the road which the Government of the United States is extending from Fort Cumberland to Wheeling, is an object of great importance to the interest of this Commonwealth."

2d Annual Report Board of Public Works, Vol. I. pt. 2, p. 29, 1817 (In re improvements on Kanawha River.)

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"The report made pursuant to this instruction is now respectfully submitted marked 'N' and will enable the legislature to decide between the different modes of forming the connection;"—

"Much of the richest territory of the State is on the Kanawha and Ohio Rivers, a great proportion of which was granted in large tracts to individuals for military service, many of which tracts have been kept entire, and the greatest part of them remain unsettled to this day; this circumstance, combined with the sparse population of the counties through which the improvement was to be made, induces the belief that the usual contributions from individuals cannot be expected in that quarter of the country. It is therefore respectfully suggested that the salutary restriction that requires three-fifths of the stock to be taken by individuals be dispensed with or modified in this instance, or that the co-operation of capitalists may be drawn to the aid of this work by combining a more immediate and profitable employment of capital with its execution."

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3rd Annual Report Board of Public Works. Vol. 2, pt. 1, p. 13, 1818.

"The president and directors of the Board of Public Works beg leave to submit to the legislature whether it is not expedient to appropriate such a portion of the income of the fund for internal improvement not exceeding one-fourth of the annual income, to the aid of turnpike companies, as that, while it shall produce an immediate advantage to many considerable districts of country which cannot otherwise receive any direct benefit from the fund, shall not obstruct the execution of other more important and extensive works. This policy seems to be recommended by the consideration that extensive districts cannot otherwise participate directly in the benefits of the fund, and that all the advantages arising from works on a small scale will be speedily realized.

"If the legislature should adopt this policy, then the board recommends to the patronage of the legislature"—

"The latter of these companies" (referring to the Leesburg Turnpike Company) "has also completed a considerable portion of the road, and a subscription by the Board of Public Works of $33,600, payable in four annual instalments, equal to two-fifths of the stock of the company, of which three-fifths are already taken by individuals, would enable them to complete the road. A statement of the situation of this company is subjoined."

Report of Swift Run Gap Turnpike Co., to Board of Public Works. B. P. W. Reps, Vol. 2, pt. 1, p. 56, 1818.

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"That experience has too fully and universally evidenced the great advantages resulting from good roads, for the transportation to market of the surplus products of a country, to render it necessary for them to enforce it by any remarks on their part, especially when addressing a body whose very name and the object of whose creation must satisfactorily indicate the growth and diffusion of liberal and enlarged views upon the propriety of internal improvement and the extinction of those prejudices which have but too long retarded a measure deeply involving the best interests of the Commonwealth. * * * *

Report of Leesburg Turnpike Co., to Board of Public Works. B. P. W., Reps. Vol. 2, pt. 1, p. 60, 1818.

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"It is further resolved that it be made known to the said president and directors that upwards of one-fifth part of said road is now completed, and that this board are of the opinion that unless the said president and directors of the Board of Public Works shall aid in the completion of said road by subscribing two-fifths of the stock aforesaid, every exertion to produce the desired object must prove abortive, and the public be deprived of a great and important internal improvement."

4th Annual Rep. Board Public Works. Vol. 2, pt. 1, p. 11, 1819.

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"In reviewing the progress and condition of the various improvements now in process of execution under the patronage of the legislature, the Board of Public Works are inspired with a just confidence that the valuable and highly important objects for the attainment of which the fund for internal improvement was created, will be fully attained by a patient perseverance in the application of the daily increasing capital of the fund to those objects."

Supplement to same, idem p. 4, Statement of Thos. W. Randolph, pres. B. P. W.

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"The subject is now mature for the decision of the legislature; and upon that depends what Virginia shall be twenty years hence; whether as now, or with a great and flourishing commerce, populous and wealthy cities, reoccupied plains on the east, and peopled mountains on the west, a connection founded on mutual interests with the great population of the Western States for the most part driven originally by want of profitable employment from her own territory; and the mighty influence such advantages cannot fail to create for the preservation of order, free principles and union in the confederacy."

5th Annual Rep. Board of Public Works, Vol. 2, pt. 5, p. 13, 1820.

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"A review of the state of the fund and of the report of the principal engineer, together with the other reports accompanying

this, affords gratifying proof that whilst the territory of the Commonwealth abounds with objects of valuable internal improvement in every district, the fund appropriated for that purpose is adequate, upon the principles upon which it is founded, to give effectual aid to such improvements to the full extent of the demands which can probably be made upon it; and that several public works of great importance to extensive districts of the State are under the patronage of the legislature rapidly advancing to completion which, without such patronage, might have languished for years, and perhaps have been wholly abandoned."

9th Annual Rep. Board Public Works Vol. 4, p. 168, 1824. (In re improvements on Kanawha River).

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"Your committee cannot close this report without calling the attention of the legislature to the growing importance of the salt trade upon the Kanawha River. At a very early period of this great undertaking, this subject engaged the attention of the legislature; and whilst the magnitude of those manufacturies, yielding at this time about one million bushels of salt per annum, promised a large revenue to the Commonwealth, a reciprocal advantage was expected to accrue to them in the increased facilities of their carriage to their markets upon the Ohio River.

"We cannot, if we would, disguise it from ourselves that Virginia, if not deteriorating, is certainly not advancing with the same rapidity as many of her sister States of this Union. Her population is passing to the West, contributing by their wealth and industry to raise up new and as yet unknown interests in that important part of the United States. It is in this point of view, as your committee conceive, that this subject becomes most deeply interesting, and regarding this great chain of improvement as a social link uniting the East and West, it deserves the highest consideration of Virginia."

10th Annual Rep. Board Public Works, Vol. 4, p. 190, 1825.

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"But few of the stocks of the canal and turnpike companies acquired by the application of the income of the fund, under the acts of the General Assembly and the resolutions of the board, as yet pay any dividend, and the revenue derived from that source is at present very inconsiderable. The appropriations made to companies with which this board has thus become connected, though unproductive of revenue, have not failed in producing a good effect."

" A spirit of improvement, it is believed, has been excited in some sections of our State where none existed before; and the assistance afforded in several instances has led to the undertaking of improvements which otherwise would not have been commenced and could not have been accomplished. The board, however, entertains the expectation that in addition to the benefit thus conferred, a revenue will in time be derived which will enable it to extend the sphere of its utility."

14th Annual Rep. Board Public Works, Vol. 6, p. 10, 1819.

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"Although it was not the original purpose of the legislature in creating the fund for internal improvement that the aid to be extended to joint stock companies should be afforded upon the principle of mere money making, yet its productiveness cannot fail to be gratifying not only as yielding income, and thus enlarging the capability of the fund for extended usefulness, but particularly as affording conclusive proof of the beneficial application of its income in the execution of important work."

"There are other companies with whom the fund for internal improvement stands connected whose prospects, though not so bright, are nevertheless encouraging. There are yet some others whose reports scarcely justify the faint expectations of even

deferred income from the capital expended, but whose work nevertheless affords important facilities to the trade of extensive and fertile districts of the State, and thus contributes to the general weal.

"This view of the condition and prospects of the companies who have been arduously engaged in making extensive and valuable improvements in our country, and to whom the aid of this fund is extended, is presented not only to excite attention to the certain and contingent advantages of such improvements, but also to repress, as fas as practicable, that spirit of impatience which so frequently manifests itself throughout the country by murmurs at the tardiness and the expense with which the works are prosecuted, and that the unprofitableness of the public investments. These murmurs seemed to indicate the idle expectation that these great public works ought to be conducted as rapidly as the ordinary operations of a farm, and a belief that the public investments are made upon the principles of common stock jobbing."

"This spirit of impatience opposes all its energies to that public spirit which should animate every community in its march to high prosperity. The latter ought to be cherished as being of inestimable value, while the former ought to be suppressed as tending to desolation only. Although it is far from being desirable that the stocks subscribed by the Board of Public Works, under the direction of the General Assembly, should be unproductive of income, yet if the enhancement of real and other property in the country be equal in amount to the investment made, the community has surely lost nothing, and if the enhancement be indefinitely greater, so also is the common benefit. That such enhancement does occur in every commmunity where the improvements of the country are vigorously prosecuted, is abundantly and irrefragibly demonstrated by the experience of Pennsylvania, New York, and New England, where lands naturally less valuable command a price from four to ten times greater than they do in Virginia; and although their public stocks should yield them no income, yet the communities are otherwise benefited by them in a ratio of arithmetical progression. Public spirit and due perception of common and mutual interest is the great desideratum in Virginia. Were it to awaken, it would readily find subjects of improvement munificently spread before them. Surely, no country possesses greater capabilities than Virginia."

15th Annual Rep. Board of Public Works, Vol. 6, p. 113, 1830

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"This prosperous state of the fund, combined with the increased solicitude of the public on the subject of internal improvements, a solicitude created by the real necessities that exist for the construction of various improvements throughout the State, and which has been heightened by the example of some of the neighboring States who have been guided by an enlightened and liberal policy on this subject, has urged on the Board of Public Works an inquiry into the capacity of the fund of internal improvement to complete the works already commenced and to construct such others as the interests of the public may render necessary. In administering the fund to the wants of so extensive a country, presenting great varieties of situation, soil, and products, with a population in some instances separated by mountains and forests, any uniform rule founded upon the principles of justice and equality seems to be impracticable.

"If the principle of only applying the funds in combination with individuals in the form of stock companies, according to the provisions of the eleventh section of the act creating the fund, should be adopted and adhered to, the consequence would be that the energies of the fund will be exhausted upon local objects of partial benefit and extent, to be found most generally in such parts of the State where the population has already acquired sufficient surplus wealth to enable them to embark in such enterprises, and where the end to be gained is the advancement of individual interest rather than the public good. On the other hand, if only the income that arises upon the capital stock or investments of the fund is to be applied as it annually accrues, the amount is totally insufficient to effect any extended scheme of improvement commensurate with the great interests of the State.

"The act creating the fund contemplated the 'rendering navigable and uniting by canals of the principal rivers, and of more intimately connecting, by public highways, different parts of the Commonwealth.' The objects embraced by it are so extensive and important in their nature as to be excluded from the reach of individual enterprise and capital; besides it may happen that improvements are required essential to the best in-

terests of the country, but from which no direct income will be realized, although the State would be abundantly remunerated by the stimulous it would give to industry by the development of new sources of wealth, by enhancing the value of lands, and by the increase of population, thereby adding to the moral and physical ability of the State to sustain itself in time of war and peace."

26th Annual Rep[illegible] Works, Vol. 12, p. 9.—1841.

* * * * * * *

"In connection with the subject of railroads, the board respectfully begs leave to submit the following remarks:

"It is well known that the capital of all our railroad companies proved to be entirely insufficient to complete the formation of the roadbeds and superstructure and to provide depots, work-shops, engines and all other necessary appendages for carrying on the business of the roads. It is equally well known that much of the capital was wasted in consequence of the necessarily imperfect knowledge of the subject which was possessed by engineers at the time of the introduction of railroads into the United States; and partly owing to neglect and want of economy, method and proper supervision in the transaction and management of their affairs at the outset and for some time after.

"The result has generally been that the companies have found the aid so liberally extended to them in the shape of loans very inadequate to their real necessity. They are mostly still involved in heavy debts, exclusive of those to the State, and the urgent demands upon them for the payment of principal and interest which they are compelled to meet promptly in order to keep their works in operation, absorb their profits to such an extent as to deprive them, in a great measure, of the ability to keep the roadbeds and the motive power, and so forth, upon them in the perfect order they should be to insure regularity, safety and expedition.

"*It must be remembered that these improvements were not fostered by the legislature through contributions in subscription and loans merely as investments of so much money in*

profitable stocks, but that they were actuated by a higher consideration, that of promoting the prosperity of the State at large by contracting to build up the local prosperity of its different sections." (Italics not in original.)

"That the most beneficial results have been experienced by every railroad that has been established is not a matter of conjecture. Industry has received from them a new impetus. The cultivation of the soil in every part of the country within the range of their influence has been greatly extended; arts, trades, and commerce flourish to a greater extent, and a greater reduction has been effected in the expense of transporting the produce of the farmer and the goods of the merchant to market, and a speedy and cheap transportation between the citizens of our own State with each other and with the citizens of other States has been established. * * * * *

EXTRACTS FROM ACTS OF ASSEMBLY OF VIRGINIA WITH REFERENCE TO EXPENDITURES FOR INTERNAL IMPROVEMENT, THROUGH JOINT STOCK COMPANIES.

CHAP. XVII.

An Act to create a fund for Internal Improvement.

[Passed February 5th, 1816.]

1. *Be it enacted by the General Assembly*, That a fund shall be, and the same is hereby created, to be denominated "The Fund for Internal Improvement," and to be applied, exclusively, to the purpose of rendering navigable, and uniting by canals, the principal rivers and of more intimately connecting by the public highways, the different parts of this Commonwealth.

* * * * * * * *

3. *And be it further enacted*, That, for the purpose of preserving and improving this fund, and of disbursing such portions of it as the General Assembly may, from time to time, direct, to be ap-

plied to any object of internal improvement, it shall be and the same is hereby vested in a corporate body, to be styled, "The President and Directors of the Board of Public Works" in which name they shall have a common seal, and perpetual succession, subject to the limitation hereinafter provided, shall be capable of suing and being sued, pleading and being impleaded, and shall have and enjoy all the rights and privileges of a corporation.

4. *And be it further enacted*, That the Governor of the Commonwealth shall be ex-officio President of the Board of Public Works; that the directors a majority of whom shall constitute a Board for the transaction of any business devolving on the corporation, shall consist of the Treasurer and the Attorney General of the Commonwealth, for the time being, and of ten citizens thereof; of whom three shall reside westward of the Alleghany mountain; two between the Alleghany and the Blue Ridge; three between the Blue Ridge and the great post road, which, passing through the territory of the Commonwealth, crosses the principal rivers thereof at, or about the head of tidewater, and the residue between that road and the sea coast.

* * * * * * * *

8. *And be it further enacted*, That the President and Directors of the Board of Public Works shall hold an annual meeting in the City of Richmond, or at such other place as may be designated by law, to begin on the first Monday in November of every year, and to continue until the business of the board is transacted—But, that the President of the Board may, at his own pleasure, or shall, at the request of any three Directors thereof, convene an extra meeting of the Board, for the transaction of any extraordinary business which may devolve on the corporation.

* * * * * * * *

10. *And be it further enacted*, That the fund for internal improvement, subject to the order of the President and Directors of the board, shall be deposited in the Treasury of the Commonwealth and kept distinct and apart from all other public money: It shall

be paid out or delivered by the Treasurer of the Commonwealth to the order of the board, certified and subscribed by the Secretary, and countersigned by the President; that the Treasurer shall keep a fair and regular account of all such disbursements, and carefully preserve the certificates upon which the same shall have been made, and shall render an account thereof, to the General Assembly, at the same time at which he renders his annual account of the disbursements of the ordinary revenue; that once in every year the Board of Public Works shall depute a committee of their body to examine the accounts of all disbursements made by order of the board, during the year next preceding the annual meeting of the board, and to compare these accounts with the Treasurer's books, and the certificates giving authority for the payment of the several sums of money, or stock, entered therein; that their reports shall certify to the board, that the same have been fully accounted for, or otherwise, as the case may be.

11. *And be it further enacted*, That the President and Directors of the Board of Public Works, shall be, and they are hereby authorized to subscribe in behalf of the Commonwealth, to such Public Works as the General Assembly may, from time to time, agree to patronize, such portions of the revenue of the fund for internal improvement, as may be directed by law but that no part of the said fund shall be subscribed towards the stock of any canal, turnpike, or other Company, until three-fifths at least of the whole stock, necessary to complete such canal, turnpike, or other public work, of such company, shall have been otherwise subscribed; nor until, of the stock subscribed, one-fifth thereof shall have been actually paid in by the respective subscribers, or the payment thereof effectually secured by bond with approved security, or a deed of trust upon the real estate of such subscriber, of twice the value of such fifth part; such bond to be taken payable to the President, Directors and Company authorized to complete such public work, and to be recoverable against the obligor or his securities, on motion ofter ten day's notice, in any court of record within the Commonwealth having jurisdiction thereof; and such deed of trust to be proceeded

upon whenever the trustee therein named shall be required to do so by such President, Directors and Company

* * * * * * * * *

13. *And be it further enacted*, That the President and Directors of the Board of Public Works shall vest in some productive fund the unappropriated dividends accruing upon any of the stock committed to their charge, until the same shall be specially applied by law to some object of internal improvement; and shall have power subject to the control of the General Assembly, to sell, from time to time, as may be ordained by law, the whole or any part of the shares held by the Commonwealth, in the stock of any canal, turnpike or other company subscribed for under the provisions of this Act, for the purpose of investing the proceeds of sale in the stock of some other similar company, subject to the like conditions as have been before expressed in this Act.

14. *Be it further enacted*, That the President and Directors of the Board of Public Works shall have power to appoint, in behalf of the Commonwealth, so many directors of every Public Work, as shall bear to the whole number of the directors of such work the proportion of the Commonwealth's shares of stock in such work, which may be subscribed in pursuance of this Act, to the whole number of shares subscribed thereto: *provided, however*, that whenever it shall be found expedient by the Legislature to authorize the subscription of any part of the fund hereby created to any company already incorporated, the provisions of this section shall not be construed as applying to such company unless it be otherwise directed by the Act authorizing the subscription.

15. *Be it further enacted*, That it shall be the duty of the President and Directors of the Board of Public Works, to keep a fair and accurate record of all their proceedings, which shall be at all times open to the inspection of the members of the General Assembly, and of the President, Directors and other officers of any company interested therein: that they shall report to the General Assembly, at or near the commencement of every annual session thereof, the exact state of the fund for internal improvement; the progress and

condition, noting especially the net income, of all the public works within the Commonwealth; the surveys, plans and estimated expense of such new works as they may recommend to the patronage of the General Assembly, together with such other important information as they may have it in their power to collect, in relation to the objects committed to their trust.

16. *And be it further enacted*, That the public faith shall be and the same is hereby solemnly pledged to fulfill the appropriation made by this Act; and that the said appropriation shall continue in force until the first day of January, of the year one thousand eight hundred and sixty-six, except at such times as the United States of America may be involved in war, or the safety of this Commonwealth may, in the opinion of the General Assembly require; when the General Assembly may withdraw (during the period of actual hostilities, or of such imminent danger), the whole or any part of the said fund for the purpose of defense; provided such withdrawal can be made without a violation of any engagement entered into under this Act.

17. This Act shall commence and be in force from and after the passage thereof.

APPENDIX III.

Extract from brief filed on behalf of West Virginia, with the Attorney General of the United States, by Hon. Alfred Caldwell, former Attorney General, and Hon. E. W. Wilson, former Governor of West Virginia, upon the question of the right of the United States to set off any claim against West Virginia on bonds of the Commonwealth of Virginia acquired by the United States before the formation of West Virginia, against the claim of West Virginia against the United States for a refund of the Direct War Tax.

* * * * * *

"Upon the adoption of the ordinance of secession, by the Virginia Convention, in April, 1861, the Wheeling Convention which, June 11, 1861, had assembled for the reorganization of the government of Virginia after adopting an ordinance for such reorganization, proceeded to, and did, August 20, 1861, adopt 'An ordinance to provide for the formation of a new State out of a portion of the territory of this State.'

Section 3 of said ordinance provided for changing the boundaries of the proposed new State, so as to include other counties therein named, among which were Jefferson and Berkeley, upon a favorable majority vote by the people of said counties, respectively.

Section 9 of said ordinance is as follows:

'The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period.'

From this proposition West Virginia has never receded. She proposed to be, was taken, received and admitted as a State of

the Union, by the Congress of the United States, with this provision as of the basis of settlement with the State of Virginia. The government of the United States is the creator of the new State, and is therefore precluded absolutely, and under any possible contingency from avoiding the provisions of this ordinance, in order to retain West Virginia's money. The Supreme Court of the United States has decided this ordinance to be binding as between Virginia, West Virginia and the United States. *Virginia* v. *West Virginia*, 11 Wall, 39.

* * * * * * * * *

The public debt of Virginia, January 1, 1861, was incurred almost exclusively in works of public improvement, railroads, turnpikes, canals, bridges, etc., and amounted to $31,779,067.32.

Of this sum there was incurred for public improvements in West Virginia, $2,784,329.29; for all other expenditures in West Virginia $559,600.00, making a total of $3,343,929.29.

The commission, summarizing from the various tabulated statements, strike the following account between the two States.

West Virginia to the State of Virginia,		Dr.
For the amounts expended and invested in her territory, as set forth in statement F..		$3,343,929 29
		Cr.
By one-fourth of the estimated value of the public buildings and other assets, as given in statement G	$968,750 00	
By three-thirteenths of the United States surplus fund, as per statement, ...	446,032 92	
By three-sevenths of the literary fund, as per same.....	647,079 92	
By the amount collected in West Virginia after January 1, 1861, as per statement E.....	328,706 22	2,390,569 06
Balance		$953,360 23

Under the resolutions creating and defining the duties of this commission, its report was made subject to the approval and ratification of the Legislatures of West Virginia and Virginia.

Under resolutions introduced into the Senate of West Virginia, the finance committee thereof made further examination of

the matter, in 1873, and reported to the Senate the result of its labors. Hon. J. M. Bennett, a member of the commission heretofore mentioned, was Chairman of this Senate Committee. Its report appears in the appendix. We quote the following:

> 'The report of the debt commissioners hereinbefore referred to, shows that all State expenditures within this State, prior to January, 1861, amounted to $3,366,929.29, and although it is apparent that bonds for quite a large amount of this sum were never issued, nevertheless the expenditures would seem to import an obligation upon our people to return every dollar which has been so contributed to the development of the territory of our State.
>
> 'The committee have not entered into the tedious process of calculating the interest, for the obvious reason that there would be as much interest on our contributions, as upon the receipts from Virginia.
>
> 'The committee have therefore assumed the foregoing sum of $3,366,929.29 as importing a debt upon West Virginia to be gathered and itemized from the report of the debt commissioners aforesaid.
>
> 'From the amount of the foregoing expenditures must be deducted the moneys paid into the Treasury of the Commonwealth of Virginia from the counties included in this State during the same period." * * * * * *

(Extracted from pamphlet presenting West Virginia's claim for the refund of the U. S. Direct War Tax, pp. 5 and 6.)

NOTE.—There were palpable errors in the *ex parte* statement of the account between the two States, contained in the reports referred to and approved in the above brief, in crediting West Virginia with items for which she could claim no credit under the Wheeling Ordinance under which those statements of that account were attempted to be made, and in failing to charge West Virginia with its "just proportion of the ordinary expenses of the State government" and other items of charge expressly required to be made by that Ordinance.

With these corrections made, the account would show as large a balance due from West Virginia as Virginia has now shown in this suit to be due by the new State.

APPENDIX IV.

Paper prepared by Professor T. S. Adams of the University of Wisconsin, defining what are the "ordinary expenses" of a State.

UNIVERSITY OF WISCONSIN.

MADISON.

DEPARTMENT OF POLITICAL ECONOMY.

T. S. ADAMS. Nov. 5, 1909.

Honorable Wm. A. Anderson,
Attorney General of Virginia,
Richmond, Virginia.

My dear Sir:

Some time ago Dr. Ely referred to me a letter from yourself concerning the question of ordinary and extraordinary expenditures. While I of course had some general knowledge of the distinction between these two terms, as used in the budget of various countries, my knowledge on the subject was not of that specific and certain character which your problem demands. It was necessary for me to do some reading and make some examinations of authorities before I could make the reply which I herewith enclose. It is very imperfect and I particularly regret that I have not had time to go through the material in our library containing the public accounts of the various States and cities of this country. I am doubtful also whether what I have written will be of any material assistance to you, but I enclose it, hoping that it may contain a suggestion or two.

Our collection of public documents in the University Library is particularly good; and if you can wait a month or so and will express the desire to have it, I will endeavor to get some student to run through this material with a view to collecting as large a

number as possible of illustrations bearing upon the use of the terms 'ordinary' and 'extraordinary' in American public accounting.

Very truly yours,

TSA/EB (Signed) T. S. ADAMS.

ORDINARY AND EXTRAORDINARY EXPENDITURES.

Ordinary expenditures are usual expenditures. What is usual in one country is not usual in another, and what is usual in a given country at one time may be unusual at another time. We should therefore except to find, and, as a matter of fact, we do find, all sorts of expenditures included in the extraordinary budgets of various countries. Precedent can be found for almost anything. In France, for example since 1833, the substance of the extraordinary budget has consisted of expenditures for the establishment of great public works, but prior to 1789 the costs of establishing and improving public works were carried in the ordinary budget.

The best treatment of this general subject is found in Wagner's 'Finanzwissenschaft.' Vol. 1, p. 135-142. Great authority is to be accorded to this treatment, inasmuch as Wagner bases what he has to say not only upon economic theory and study of the law, but upon the experience of the greater European nations. According to Wagner, there is a three-fold distinction between ordinary and extraordinary expenditures:

1. The first distinction turns upon the time at which the expenditure becomes necessary. Extraordinary expenditures from this viewpoint arise out of unexpected demands. Wagner notes, however, that in a great state the great number of trivial or small items of expense which are unforseen assume, in the aggregate, a certain regularity which makes it possible to provide for them by a contingent or reserve fund. Although Wagner refers to these items as 'diese kleinen Posten ausserordenlicher Ausgeben,' he really suggests that they should, in the aggregate, be regarded as regular or ordinary expenses; while the individual items are not foreseeable, their aggregate is.

II. The second and most important distinction turns upon the durability or permanence of service for which the expenditure is made and rests upon a contract similar to that made in private economics between circulating and fixed capital.

Under ordinary expenses here, Wagner mentions interest on the public debt and his language suggests that payments on the principal of the public debt when made periodically or annually in accordance with the terms of the loan should also be included among the ordinary expenses (although he protests that there is no general economic principle which requires the regular payment of a public debt).

(It will be noted that under the first distinction which turns upon the certainty or accuracy with which an expense may be anticipated, interest payments are even more clearly and logically included among the ordinary expenses, because no expense is more certain or more specifically fixed with respect to time than that of interest payment).

The extraordinary expenditures under this head are those regular or intermittent expenditures for things whose use or service extends over far more than one fiscal year or period. Wagner distinguishes three special groups here:

1. Capital outlays giving rise to a lasting use, either for—

(a) quasi-private industries and undertakings capable of yielding profit to the State (e. g., forests, railroads, mines, postal and telegraph systems;

(b) or for the establishment and betterment of what may be called the 'immaterial capital of the state' (e. g., expenditures for the introduction and execution of great public reforms such as the land cadastre, reconstruction of judicial system, enfranchisement of serfs, etc.)

2. Irregular productive and remedial expenditures to correct conditions which threaten the life or property of the State, (e. g., war, famine, floods, insurrection, etc.)

"The fact that Wagner nowhere mentions expenditures for hospitals, insane asylums, prisons, etc., is significant and indicates a belief on his part that they are 'ordinary' expenses."

III. The third distinction is the purely legal one and corresponds for the most part to the well-known difference between standing and annual appropriations.

Wagner mentions here as the most characteristic items of ordinary or standing expenses, payments of interest on the public debt and the payments of such parts of the principal as are regularly retired in accordance with the terms of the loan. Legislative expenses (i. e., those necessary for the assembling and functioning of the legislature) furnish another characteristic item.

(It seems difficult to imagine how any claim can be made for the inclusion of interest payments among the extraordinary expenditures. Borrowing, with its necessary corrolary of regular interest payments, is the specific device by which irregular things are made regular, unbearably heavy burdens divided into those which may be borne with ease; and as surely as the principal of the loan is to be classed among extraordinary receipts, so surely must the interest payments be classed among the ordinary expenditures. Interest is the instrument by which extraordinary difficulties are converted into ordinary problems. (øSee foot note.)

øThe last point is well brought out in the article entitled Budget sur Resources Extraordinaires in Say's Dictionnaire des Finances, Vol. I, p. 723:

'Ce n'est que de notre temps qu'il a été institué une théorie pour la défense des Budgets Extraordinaires systématiques. Les budgets ordinaires sont, dit-on, les budgets de la vie normale et annuelle du pays, son compte industriel d'exploitation, et ont l'impôt et les revenus des biens de l'État pour fonds d'entretien; les budgets extraordinaires répondent à leur compte industriel de premier établissement, indefiniment continué comme se continue indefiniment l'expansion de l'activité d'un peuple qui vit de siécles et non d'annéss et son fonds de service est l'emprunt, dont le budget

ordinaire ne se ressent que par l'obligation ou il est d'en payer les intérêts pour la part de jouissance qui lui en revient.'

The country which has, perhaps, made the widest use of the extraordinary budget is France. The experience of France is discussed in a most illuminating way in Chapters 9 and 10 of René Stourm's 'Le Budget.' We find here a number of definitions of an official character. One of these definitions, made in 1862 and often quoted in French law and financial debate, is as follows:

'The credits of the ordinary budget ought to provide for the obligatory and permanent services of the State, assuring the payment of the debt, the execution of the laws, the administration of justice, collection of revenues, and the public defense,' p. 176.

The public debt included in the ordinary budget covers the consolidated, perpetual bonds and annuities, all kinds of terminable bonds and annuities, and 'la debt viagere' (Pensions, life annuities, etc.)'

The definition of 'extraordinary' expenditures made by the same author in 1862 is as follows:

(The extraordinary expenditures comprehend those for great public works, new constructions, abnormal military demands required for the protection of our exterior or foreign interests; in a word, all those expenditures corresponding to monetary needs and destined to disappear ought not to figure among the permanent charges.) Stourm, p. 196.

See foot note.ø

øThe comment of the then Minister of Finance, M. Magne, upon this definition is exceedingly illuminating, p. 196, Stourm.

'En général, on ne prend pas assez garde aux différents rôles de L'Etat. En même temps qu'il est tenu de solder, avec ses ressources ordinaires, ses dépenses courantes . . . . en même temps, il est propriétaire, il a un actif immobilier et mobilier, qu'il est tenu, non seulement d'entretenir, mais de perfectionner, dans l'intérét de tous et de chacun. Lorsque L'Etat se procure une ressource, par voie extraordinaire, par

voie d'emprunts, et que cette ressource, est appliqée à cette nature de dépenses, il ne fait qu'un placement, qu'une transformation de valeur, il augments la fortune immobiliére et mobiliére de chacun. Ainsi donc, on a raison de ne pas confondre ces deux natures de dépenses, les unes, qui sont fongibles, qui disparaissent, le laissent à l'avenir ni charges, ni résultats; celles, au contraire, qui se consolident, qui s'incorporent au sol, qui augmentent la fortune de l'Etat . . . .' Corps legislatif, 6 avril 1869.

Finally it may be interesting to summarize the great French minister de Freycinet's discussion of this subject.

M. de Freycinet's divided extraordinary expenditures into three classes, Necessary, Optional, and Illegitimate.

A. "The necessary expenses are those which result from events which it is not within the power of nations to prevent or at least the financial consequences of which it is impossible to avoid, as, for example, the war of 1870 and the enormous fiscal burdens which it has entailed upon the country."

B. "The optional expenses represent essentially expenses for public works. I characterize these expenses as optional because they do not inevitably impose themselves upon a country. The government is never forced absolutely to assume these expenses and especially is never obliged to assume them at any particular time."

C. "I call all those expenses illegitimate which ought to find no place at all in the extraordinary budget. When the extraordinary budget comes to be but a covert means of increasing the ordinary budget, I consider that the expenditure is badly placed and that the extraordinary budget ought to be abolished. The extraordinary budget should not serve as a revenue for those expenses that one does not wish or dare to classify in the ordinary budget but which by their nature belong there." Stourm, p. 204.

There have, for instance, been included in the extraordinary budget at times expenditures for books for the library, gratuities to the employees of the central administration, relief to widows,

expenditures for the celebration of July 14th, and for carpenter's work, subscriptions to telephone companies, provision of oil for light houses, etc.

The preceding paragraph merely emphasizes my opening statement to the effect that precedent may be found for almost anything in this connection. But, while this is true, the great weight of usage favors the inclusion among the extraordinary expenditures, of the costs of war and public calamity (which, because of their size, have to be defrayed by public loans) and also the costs of introducing or establishing great public works of an industrial character. Capital outlays for hospitals, asylums, prisons, educational institutions, and the like, are exceedingly doubtful. But it may be said with certainty that according to the prevailing usage, only such (i. e., for hospitals, asylums and the like) capital outlays as necessitate public loans can be placed among extraordinary expenditures. Interest payments on the public debt, regular payments on the principal prescribed in advance either by law or contract, and pensions, belong, by the overwhelming mass of precedent, among ordinary expenditures.

I append a few scattering illustrations which may be of interest.

(1) The budget of the German Empire is regularly divided into ordinary and extraordinary receipts and expenditures. The ordinary expenditures are divided into permanent and temporary. The regular expenditures for industrial undertakings, (post, telegraph, railroads, government printing offices, etc.) as well as most of the expenditures for the public debt and for pensions, appear under the permanent ordinary expenditures.

(2) The budget of Algeria regularly contains the following caption: Depenses extraordinaires, subdivided into the two following heads: (a) Emploi des fonds d'empreunt, (b) Emploi de L'excédent des fonds de reserve. Among the other and presumably the "ordinary" heads, we find debt, public works, agriculture, colonization, and diverse works of benevolence and public utility (poor relief, etc.)

(3) The budgets of Austria and Hungary regularly contain the item extraordinary expenditures. Just what this covers I do not know, but it has been reduced to very small compass in recent years, particularly in Austria. Expenditure for public debt, however, including regular payments on the principal of the debt, is included in the ordinary budget.

(4) Payments of interest and the regular payments on the principal of the public debt are classified in the ordinary expenditures in Belgium.

(5) In Egypt, according to a brief resume of the budget given in Fenn "On the Funds," edition of 1898, p. 323, the following expenditures appear in ordinary budget: Pensions, tribute, debt payment, expenses of the army of occupation, expenditures for the "suppression of the corvee," and "unforseen expenditures."

(6) According to the same authority, the Russian budget includes under ordinary expenditures, payments on the State debt—interest and capital—payments on the railway debt—interest and capital—and also "unforseen expenditures."

(7) Professor F. R. Clow, an exceedingly able and careful writer in the Quarterly Journal of Economics, Vol. 10, pages 461-4, cites as instances of extraordinary expenditures payments for the purchase of land, for the construction of permanent works, and the redemption of public debt. Under the ordinary expenditures, he includes interest payments on the public debt. According to Professor Clow, the accounts of the City of Cleveland, at the time he was writing, included under ordinary expenditures everything except repayment of loans, refunds, investments, and similar items."

APPENDIX V.

Claim against West Virginia computed from the Master's findings of March 17, 1910, *under Wheeling Ordinance.*

A.

Par. III.	Expenditures in West Virginia counties, (page 83)	$ 2,811,559.98
" IV.	Proportion of Ordinary Expenses on Population Basis, with slaves, (p. 140)	8,147,455.92
" VII.	Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
		$11,459,843.90
" VI.	Receipts from West Virginia counties, (p. 179)	6,105,884.75
		$ 5,353,959.15

B.

Par. III.	Expenditures in West Virginia counties, (page 83)	$ 2,811,559.98
" IV.	Proportion of Ordinary Expenses on Population Basis, *without* slaves, (p. 140)	11,452,862.66
" VII.	Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
		$14,765,250.64
" VI.	Receipts from West Virginia counties, (p. 179)	6,105,884.75
		$ 8,659,365.89

C.

Par. III.	Expenditures in West Virginia counties, (page 83)	$ 2,811,559.98
" V.	Proportion of Ordinary Expenses on Fair Estimated Valuation Basis June 20, 1863, *with* slaves, (p. 172)	6,078,367.96
" VII.	Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
		$ 9,390,755.94
" VI.	Receipts from West Virginia counties, (p. 179)	6,105,884.75
		$ 3,284,871.19

D.

Par. III.	Expenditures in West Virginia counties, (page 83)	$ 2,811,559.98
" V.	Proportion of Ordinary Expenses on Fair Estimated Valuation Basis June 20, 1863, *without* slaves, (page 172)	9,463,553.58
" VII.	Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
		$12,775,941.56
" VI.	Receipts from West Virginia counties, (p. 179)	6,105,884.75
		$ 6,670,056.81

E.

Par. III.	Expenditures in West Virginia counties, (page 83)	$ 2,811,559.98
" V.	Proportion of Ordinary Expenses on Fair Estimated Valuation Basis Jan. 1, 1861, *with* slaves, (page 173)	6,805,289.57

"	VII. Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
		$10,117,677.55
"	VI. Receipts from West Virginia counties, (p. 179).....	6,105,884.75
		$4,011,792.80

F.

Par.	III. Expenditures in West Virginia counties. (page 83).....	$ 2,811,559.98
"	V. Proportion of Ordinary Expenses on Fair Estimated Valuation Basis Jan. 1. 1861, *without* slaves, (page 173)	8,586,648.25
"	VII. Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
		$11,899,036.23
"	VI. Receipts from West Virginia counties, p. 179).....	6,105,884.75
		$ 5,793,151.48

Note: See A. By using Proportion of Ordinary Expenses on Defendant's method of arriving at *Average Population with* slaves, the amount of claim as in A. is reduced by $644,967.61. (See page 141).

Note: See B. Same *without* slaves the amount of claim as in B. is reduced by $714,326.68. (See page 141).

The Master has adopted the plaintiff's method, so these figures are of comparative interest only.

APPENDIX VI.

Showing Results Under West Virginia's Construction and Application of Wheeling Ordinance.

VIRGINIA vs. WEST VIRGINIA.

RESULT OF WEST VIRGINIA'S ACCOUNTING UNDER THE WHEELING ORDINANCE.

	Using Total Population Basis for Division of Ordinary Expenses	Using Population *without* Slaves for Division of Ordinary Expenses.	Using Fair Estimated Valuation of Real and Personal Property for Division of Ordinary Expenses.	Using Fair Estimated Valuation of Real and Personal Property on Gold Basis for Division of Ordinary Expenses.
Paragraph III of Decree Joint Exhibit "C" I—Page 1.				
Expenditures by Va. in W. Va. as computed by West Virginia . . .	$1,251,288 92	$1,251,288 92	$1,251 288 92	$1,251,288 92
Paragraph IV of Decree Joint Exhibit "D" I—Page 1.				
Ordinary Expenses of Government, $18,207,-684.29, as computed by West Virginia. Joint Exhibit "D" I—Page 4	3,391,763 84	4,854,733 07		
Paragraph V of Decree Joint Exhibit "E" I				
Defendant's method of determining Fair Estimated Valuation of Real and Personal Property, per Joint Exhibit "E" I—Page 4 including Slaves and Income as Personal Property	. . . . .	. . . . .	2,499,987 88	
Defendant's Alternative Method Defendant's Exhibit "E" III—Page 3, using Gold Basis for Assessments, and including Slaves as Personal Property . .	. . . . .	. . . . .	. . . . .	3 773,289 45
Paragraph VII of Decree Defendant's Exhibit "G" I—Page 1. Value of Money, Stock, Property, and Credits acquired by West Virginia	176,120 00	176,120 00	176,120 00	176,120 00
Paragraph VI of Decree Joint Exhibit "F" I	$4 819,172 76	$6,282,141 99	$3 927,396 80	$5,200,678 37
All moneys paid into the Treasury of Virginia from West Virginia counties, West Virginia claim	7,051,215 56	7,051,215 56	7,051,215 56	7,051,215 56
Excess of Receipts by Virginia over payments made by her as computed by West Virginia	$2,232,042 80	$ 769,073 57	$3,123,818 76	$1,850,537 19